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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASOCIACION DE RECLAMANTES, AMINTA ZARATE, LUIS RIOJAS, FELIPA FLORES BENAVIDEZ, MARIA AGUIRRE DE SCHULTZ, NIEVES GUERRERO CHAPA, SANTOS ZARATE PRIETO,

Petitioners,

v.

THE UNITED MEXICAN STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT J. SALAZAR
RUSSELL E. VIGIL
650 Lawrence Street Center
1380 Lawrence Street
Denver, Colorado 80204

MITCHELL ROGOVIN *
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

JESS J. ARAUJO
DIMARCO & ARAUJO
A Professional
Law Corporation
1015 North Broadway
Santa Ana, California 92701

Of Counsel:
JOAQUIN G. AVILA
MORRIS J. BALLER
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATION FUND
28 Geary Street
San Francisco, California 94108

* Counsel of Record

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QUESTIONS PRESENTED

Under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(4), jurisdiction exists against foreign sovereigns in cases involving "rights in immovable property situated in the United States." The questions presented are:

1. Whether, where Mexico (a) asserted formal claims on behalf of Petitioners, most of whom were American citizens, against the United States seeking the return of certain identified lands located in Texas, or compensation therefor, (b) then, by Treaty, released the United States from any obligation to return said lands or compensate Petitioners for their value, and (c) at the same time, concededly assumed itself the obligation to compensate Petitioners for their lost Texas lands, does jurisdiction exist under § 1605(a)(4) in that "rights in immovable property situated in the United States are in issue"?

2. Whether the Court of Appeals' conclusion that, as a result of the 1941 claims settlement treaty between Mexico and the United States, Petitioners' rights to compensation for their Texas lands are no longer "rights in immovable property" is in conflict with this Court's decisions in *Bachman v. Lawson*, 109 U.S. 659 (1884), and *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), which establish that claims settlement treaties neither create nor extinguish property rights but merely change the remedy available to the injured party?

3. Whether the Court of Appeals' conclusion that Petitioners' claims now have a mere "historical" relationship to United States land, outside the scope of the "immovable property" exception to sovereign immunity, is correct, when Petitioners' right to relief would turn on their proof of title in their ancestors to real property located in Texas and on the valuation of such property?

4. Whether, in order to avoid difficult constitutional questions, the 1941 claims settlement treaty must be interpreted, not as "extinguishing" Petitioners' right to compensation for their Texas lands, but merely as transferring or assigning the obligation to satisfy said claims from the United States to Mexico?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Asociacion de Reclamantes et al. v. The United Mexican States*, is reported at 735 F.2d 1517 (D.C. Cir. 1984), and is set forth in Appendix A. The opinion of the United States District Court for the District of Columbia is reported at 561 F. Supp. 1190 (D.D.C. 1983) and is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1984. The petition for rehearing was denied on August 28, 1984. On October 23, 1984, Chief Justice

Burger extended the time within which to file a petition for a writ of certiorari to and including December 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY, CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

This case involves the jurisdictional provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1605 (1976); the Treaty On Final Settlement Of Certain Claims, 56 Stat. 1347, T.S. No. 980 (Nov. 19, 1941) (hereinafter the "1941 Treaty") between Mexico and the United States; and the Fifth Amendment to the U.S. Constitution. These are reproduced in Appendix E. The principal provision is § 1605(a)(4) which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which . . . rights in immovable property situated in the United States are in issue.

STATEMENT OF THE CASE

Petitioners are predominantly American citizens of Mexican descent.[1] They seek to recover just compensation for 12 million acres of land in Texas wrongfully taken from their families by the United States and the State of Texas. Petitioners now proceed against Mexico, as, under the 1941 Treaty, Mexico assumed the obligation of the United States to provide them compensation for such land.

As the complaint below alleged, Petitioners' ancestors acquired title to their Texas land prior to 1848 under land grants made by Spain and Mexico. Amended Complaint, ¶ 9, Pet. App. 49a-50a (hereinafter "Complaint"). Under the Treaty of Guadalupe Hidalgo, 9 Stat. 922, T.S.

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[1] Four of the individual-named Petitioners are American citizens and residents; two are citizens and residents of Mexico. Petitioners sought to represent a class of over two thousand claimants, most of whom are American citizens residing in the United States. *See* Amended Complaint, ¶ 8(a), Pet. App. 47a. The Asociacion de

No. 207 (Feb. 2, 1848), these private land grants were to receive the protection and respect of the United States. Beginning in the late nineteenth century, however, Petitioners' ancestors were wrongfully driven off their land in Texas by a combination of private and governmental action. *Id.* ¶ 12, Pet. App. 50a.

In the early 1920's, the Government of Mexico began actively asserting the claims of the Petitioners' families, most of whom were American citizens,[2] against the United States Government. In 1923, the United States and Mexico concluded a treaty which created a General Claims Commission to resolve all claims of private citizens asserted by one nation against the other and to provide "just and adequate compensation for [the] losses and damages" suffered by the claimants. General Claims Treaty, art. V, 43 Stat. 1730, T.S. No. 678 (Sept. 8, 1923) (hereinafter "1923 Treaty"), Pet. App. 84a; Complaint, ¶¶ 16-18, Pet. App. 51a. Under the procedures of the 1923 Treaty,[3] Mexico asserted against the United States, on behalf of Petitioners' families, 433 specific land grant claims which it valued in 1925 at an exact dollar figure exceeding $193 million. Complaint, ¶ 19, Pet. App. 51a-52a. Each of these claims identified the exact tract of

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Reclamantes is a Texas nonprofit corporation established to assist Petitioners and other claimants in pursuing their claims against Mexico. It has no affiliates, parent companies or subsidiaries. See Sup. Ct. R. 28.1.

[2] Under Article VIII of the Treaty of Guadalupe Hidalgo, Mexicans such as Petitioners' ancestors who remained in Texas after the war automatically became U.S. citizens one year after the Treaty's effective date. *See* Complaint, ¶¶ 19, 21-22, Pet. App. 51a-53a (alleging U.S. citizenship of families at time Mexico represented them in proceedings against U.S.).

[3] Under the General Claims Protocol of 1934, 49 Stat. 3531, E.A.S. No. 57 (hereinafter "1934 Protocol"), this Commission was replaced by an appraisal procedure; the Protocol provided, however, that the 1923 Treaty itself would otherwise remain "fully effective and binding." 1934 Protocol, § 6(f).

land at issue and placed an appraised value on it.[4] In each claim, Mexico alleged that one of Petitioners' families was the "legitimate owner" of land in Texas and explicitly sought to enforce their rights to title to and possession of the land by "restoration" of the land itself or, alternatively, by the "payment of its value." Complaint, Ex. B., Pet. App. 74a-75a. But by 1940, none of Petitioners' claims had been decided. *Id.*, ¶¶ 19, 23-25, Pet. App. 52a-53a.

Thereafter, the two countries entered into the 1941 Treaty, which was intended to finally settle the liability of each government on claims asserted against it. Pet. App. 88a-93a; Complaint, ¶ 27, Pet. App. 53a. By releasing the United States from liability on Petitioners' claims, Mexico gained a set-off regarding the claims which were being pressed against it by the United States.[5] As the Court of Appeals noted, the 1941 Treaty resulted in the assumption by each government of the obligation to pay the claims which it had presented to the Claims Commission, including the 433 land grant claims at issue here. 735 F.2d at 1519, Pet. App. 3a.

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[4] A complete listing of these 433 claims, showing the original grantee, the claimants, their residence, and the location and value of the tract, was prepared by Mexico in 1932 and attached as Exhibit C to the Amended Complaint. For reasons of space, this Exhibit was not duplicated.

[5] The 1923 Treaty directed the Claims Commission to value the claims on each side and, thereafter, to the extent that the aggregate claims advanced by one nation exceeded the claims of the other, the difference would be paid sovereign to sovereign. 1923 Treaty, art. IX, Pet. App. 85a. Each government was then to pay the claims of those whom it had represented. The 1941 Treaty and ancillary agreements provided for a net payment by Mexico to the United States of $40 million, and various other concessions and benefits flowing back *to* Mexico from the United States. *Cf.* Dawson and Weston, *"Prompt, Adequate And Effective": A Universal Standard Of Compensation?*, 30 Fordham L. Rev. 727, 740-41 (1962) (Mexico was released from responsibility for more than $350 million in American claims).

After signing the Treaty, Mexico, by Presidential Decree,[6] acknowledged its obligation to satisfy Petitioners' claims. Following this Presidential Decree, Mexico repeatedly reaffirmed in writing its obligation to Petitioners and their families. Complaint, ¶¶ 31-33, Pet. App. 55a. Indeed, in 1980, the head of the Legal Advisor's Office of the Mexican Foreign Ministry assured Petitioners that Mexico would honor its obligations and that the decision had been made by the "highest authorities" of the Mexican government to pay the claims promptly. *Id.* ¶ 47, Pet. App. 57a. As the District Court noted in its opinion, "[a]s recently as January 29, 1982, the Attorney General of Mexico acknowledged the claims." 561 F. Supp. at 1195, Pet. App. 25a.[7] Although the United States paid its claimants within seven years, payment has never been made by Mexico notwithstanding its conceded obligation. Complaint, ¶¶ 28, 56, Pet. App. 54a, 59a.

On September 18, 1981, Petitioners sued Mexico under the FSIA, relying on § 1330, and § 1605(a)(4) as their major jurisdictional base. On Mexico's motion to dismiss, the District Court was of the view that jurisdiction under 28 U.S.C. § 1605(a)(4) would exist if the case involved "an action . . . to recover money derivative of real property rights." 561 F. Supp. at 1196, Pet. App. 28a. However, it denied jurisdiction because it viewed the Petitioners' compensation rights as mere "intangible property rights created through the diplomatic process," *id.*, since, it believed, Petitioners had not pled that they or their

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[6] Amended Complaint, ¶ 30, Ex. E (Decree of President Manuel Avila Camacho, December 9, 1941, published in El Diario Oficial, December 31, 1941, Vol. CXXIX, § 5, pp. 1 and 2) (hereinafter "1941 Decree"), Pet. App. 54a-55a.

[7] Indeed, at oral argument in the District Court, counsel for Mexico conceded: "Nobody argues here that there is not some kind of obligation. The Government of Mexico has acknowledged that too frequently to make that a point of debate." Tr. of Oral Arg. at 65 (Jan. 13, 1983).

predecessors held a title interest in the land prior to 1923.[8] Pet. App. 29a.

The Court of Appeals rejected the District Court's analysis. It agreed with Petitioners that the District Court's characterization of Petitioners' claims as mere "intangible property rights" was erroneous, because an express allegation of title had in fact appeared in an Exhibit to the Complaint. Pet. App. 6a n.4. However, while the District Court had agreed with Petitioners that jurisdiction under § 1605(a)(4) extended to "an action . . . to recover money derivative of real property rights," Pet. App. 28a, the Court of Appeals characterized this view as "expansive" and rejected it. Pet. App. 6a-10a.

The Court of Appeals, while conceding that immediately prior to the 1941 Treaty the Petitioners' "predecessors in interest possessed a claim to title and possession," Pet. App. 11a-12a, nevertheless concluded that jurisdiction was lacking under § 1605(a)(4) because in some way Petitioners' rights had been extinguished by that Treaty. Believing that Congress intended a "narrow" construction of § 1605(a)(4), it analogized the scope of the "immovable property" exception to sover-

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[8] Plaintiffs had also argued that jurisdiction existed under the "tort" provision of § 1605(a)(5). The District Court held it unavailable under the "discretionary function" exception. The Court of Appeals did not reach the discretionary function issue; it held that all elements of the tort must occur within the United States; because the Court of Appeals viewed Mexico's failure to pay as having occurred in Mexico, it found jurisdiction lacking. Mexico also raised the "act-of-state," and statute of limitations in defense. The District Court found the act-of-state doctrine applicable; the Court of Appeals did not reach that issue in view of its jurisdictional holding. While neither Court below addressed the limitations issue in their opinions, at oral argument the District Court had stated its view that Mexico's apparent acknowledgments of its obligation made the limitations defense unavailable on the present record. Tr. of Oral Arg. at 31 (Jan. 13, 1983).

eign immunity to the "local action" rule, to conclude that § 1605(a)(4) is "limited to disputes directly implicating property interests or rights to possession." Pet. App. 9a. It discounted the legislative history's reference to adjudication of "rent . . . and similar matters" on the basis that they frequently, though not always, "involve issues of title and possession," as well as disputes over money. Pet. App. 10a n.5.

The lynchpin of the Court of Appeals' analysis, however, is its conclusion that Petitioners' "property claims . . . were extinguished by the 1941 Treaty." Pet. App. 12a. Although recognizing the conceded obligation of Mexico to compensate the Petitioners, and the fact that "whether appellants' predecessors in interest ever in fact held title to these lands would . . . be relevant to their entitlement to compensation from Mexico," it concluded that these issues were of purely "historical interest" to the United States. Pet. App. 12a. In the Court's view, while Mexico may have "obligated itself under its own laws" to pay Petitioners, adjudication would not affect present property interests or possessory rights in the United States and thus jurisdiction was lacking. Pet. App. 11a.

Judge Edwards' separate concurrence emphasized that he regarded the case to be "highly unique," and that he did not agree that, "in a contemporary setting," the property rights of aliens in this country could be extinguished without compensation or consideration through a treaty with a foreign sovereign. Pet. App. 15a.[9]

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[9] Judge Edwards' reference to Petitioners as "aliens" is mirrored in the majority opinion as well. *See* Pet. App. 11a. ("Mexico . . . obligated itself under its own law to its nationals"). This is perplexing since the Complaint clearly pled the U.S. citizenship of the claimants both at the time of the assertion of their claims and at present. Moreover, by 1849, under the terms of the Treaty of Guadalupe Hidalgo, those Mexicans still residing in Texas became U.S. citizens, and thus were U.S. citizens at the time their land was taken from them. See note 2, *supra*. While under *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), their citizenship is

REASONS FOR GRANTING THE PETITION

The Court of Appeals' grudging interpretation of the jurisdictional provisions of the Foreign Sovereign Immunities Act has deprived thousands of American citizens of Mexican descent of an American judicial forum to adjudicate claims against Mexico for compensation for the loss of land located in Texas, an obligation Mexico has admitted to exist. The ruling below is completely contrary to the expressed purpose of the Congress in enacting the statute, and to any fair reading of the jurisdiction it established over claims involving "rights in immovable property situated in the United States." Moreover, the ruling below is founded upon the court's conclusion that a claims settlement treaty entered into between Mexico and the United States *extinguished all existing property rights* of the private claimants. This ruling is in conflict with this Court's decisions in *Bachman v. Lawson*, 109 U.S. 659 (1884), and *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), and manifests a confusion concerning the effect of claims settlement treaties on the rights of private claimants that should be settled by this Court.[10]

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irrelevant to the Court's jurisdiction, the Court of Appeals' misunderstanding of this point may have colored its perception of the interest of the United States in exercising jurisdiction here. *Cf. United States v. Belmont*, 301 U.S. 324, 332 (1937) (distinguishing between foreign nationals and American citizens with respect to U.S. public policy that private property not be taken without just compensation in context of expropriations by foreign sovereign).

[10] Paradoxically, while the Court of Appeals rejected jurisdiction because, in its view, the 1941 Treaty had *extinguished* Petitioners' "property claims," the District Court had rejected jurisdiction under § 1605(a)(4) because it believed Petitioners' claims had been *created* by the diplomatic process which culminated with the 1941 Treaty. *See* pp. 5-7, *supra*. The confusion of the lower courts is perhaps attributable to the fact that this Court has, in recent years, not fully addressed the effect of claims settlement treaties on private property, although the decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981) approached this terrain.

I. THE COURT OF APPEALS' INTERPRETATION OF THE 1941 TREATY CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

The Court of Appeals agreed that, prior to the 1941 Treaty, "[a]ppellants' predecessors in interest possessed a claim to title and possession, undoubtedly a 'right in immovable property' at the time." Pet. App. 11a-12a. Yet, the Court held that the Petitioners' present claims do not involve "rights in immovable property" within the scope of § 1605(a)(4) because, in its view, the property rights of Petitioners' predecessors were "extinguished" by the 1941 Treaty. *Id.* This holding is directly contrary to the longstanding rule established by this Court that settlement treaties, aimed at compensating damage caused by the violation of property rights, neither create new rights nor extinguish preexisting rights, but merely transfer between sovereigns the obligation to satisfy the preexisting rights. *See, e.g., Bachman v. Lawson*, 109 U.S. 659 (1884); *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828); *see also Great Western Insurance Co. v. United States*, 112 U.S. 193, 198 (1884); *Atocha v. United States*, 8 Ct. Cl. 427 (1872), *mandamus denied*, 84 U.S. (17 Wall.) 439 (1873); *Meade v. United States*, 2 Ct. Cl. 224 (1866), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869).[11]

Indeed, the reasoning used by the Court of Appeals to find jurisdiction lacking under § 1605(a)(4) is virtually identical to that decisively rejected by this Court in *Comegys v. Vasse*. There the dispositive question was whether a payment under a claims settlement treaty was a donation from the government or an indemnification for the violation of a preexisting property right. The

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[11] *See also* 2 C. Butler, *The Treaty-Making Power Of The United States* §§ 443-44 (1902); Note, *Constitutional Issues In The Settlement Of Property Claims Against Foreign Sovereigns*, 2 Hastings Const. L. Q. 1091, 1104-15 (1975).

argument that the payment was a donation (an argument rejected by the Court), was stated as follows:

> Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain after that condemnation is not founded in right, but in policy between the nations providing compensation to individuals who have lost property by sentences which are thought unjust. The grounds of relief before the commissioners are, the want of any redress in municipal courts. Whatever the individual obtains is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without anything in the nature of a consideration, yet, for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund belonging to an independent authority.

26 U.S. (1 Pet.) at 216 (quoting *Campbell v. Mullet*, 2 Swanston 551).

In *response* to this view, Justice Story, speaking for the Court, stated:

> Such is the language of the learned judge, and we cannot say that the reasoning is at all satisfactory . . . . *The right to compensation in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice. . . . It recognized an existing right to compensation* in the aggrieved parties, and did not, in the remotest degree, turn upon the notion of a donation or gratuity.

26 U.S. (1 Pet.) at 216-17 (emphasis added). *Comegys* establishes that settlement treaties "recognize" preexisting property rights and provide a remedy for violations of those rights.

The rule established in *Comegys* is no isolated statement; it has been adhered to by this Court in sub-

sequent cases. Thus, in *Bachman v. Lawson*, 109 U.S. 659 (1884), plaintiffs sued for compensation under a retainer agreement by which they were to assist the defendant in securing redress from Great Britain for damage suffered as a result of the seizure of a vessel. After the agreement was signed, the 1871 Treaty of Washington was entered into and provided for the establishment of a claims tribunal for the evaluation and payment of such claims. Subsequently, the defendant retained different counsel to assist it before the claims tribunal and refused to pay plaintiffs on the ground that their agreement "relat[ed] solely to the claim which existed at its date; that that claim was extinguished by the operation of the treaty of Washington." 109 U.S. at 662. The Supreme Court decisively rejected this argument:

> 'The right to indemnity for an unjust capture . . . *is a right attached to the ownership of the property itself.* . . . The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice. . . . It recognized an existing right to compensation. . . .' [quoting *Comegys.*] *The claim established before the court of commissioners of Alabama claims was manifestly the very claim contemplated by the agreement in suit.*

Id. at 662 (emphasis added). Decisions of the lower court have similarly viewed the effect of claims settlement treaties on private rights.[12]

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[12] In *Atocha v. United States*, 8 Ct. Cl. 427 (1872), *mandamus denied*, 84 U.S. (17 Wall.) 439 (1873), the United States had argued that no interest should be allowed on an award by the Court of Claims to Atocha, an American citizen who had been wrongfully expelled from Mexico in 1845, since at the time, interest was not allowable on claims against the United States. 2 C. Butler, *The Treaty-Making Power of the United States* § 444 at 306 n.8 (1902). Under the 1848 Treaty of Guadalupe Hidalgo, which settled numer-

In short, a claims settlement treaty such as the 1941 Treaty does not create new rights nor does it extinguish preexisting rights. Rather, it transfers between the sovereigns, through an express or implied assumption, the obligation to satisfy the preexisting, underlying claims.[13] Thus, the fact that the 1941 Treaty altered the Petitioners' remedy from the return of the land or payment of compensation by the United States, to the payment of compensation by Mexico, does not change the nature of their rights, which derive from immovable property, and therefore, are within the purview of § 1605(a)(4).

Yet the Court of Appeals, while acknowledging the core holding of *Comegys* that " 'payment [of a claim] under a claims settlement treaty . . . [is properly viewed as] an indemnification for the violation of a preexisting property right,' " Pet. App. 12a, (quoting Appellants' Brief at 15), viewed this "indemnification" as a separate claim involving different rights:

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ous private claims between Mexico and the United States, Mexico had been fully discharged from liability on Atocha's claim for damages, and the Court of Claims so held. 8 Ct. Cl. at 437. But it nonetheless rejected the argument that, as a result of the 1848 treaty, his claim should now be regarded merely as a claim against the United States. Recognizing the continuity of Atocha's claim, the court stated "[t]hough the suit is nominally against the United States, it is in reality against the government of Mexico . . . ." *Id.* at 438. Interest was awarded from the date of his wrongful expulsion, in spite of the fact that the award would be paid by the United States. *Id.* at 438-39.

[13] *See e.g., Great Western Ins. Co. v. United States*, 112 U.S. 193, 199 (1884) ("[*Ex Parte Atocha*] was a case in which, by the express terms of the treaty, the United States had assumed the debt of Mexico to Atocha and others of his class. The present is a case in which such assumption is implied from the circumstances of the treaty and the receipt of the money."); *Meade v. United States*, 2 Ct. Cl. 224, 276 (1866), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869) ("By . . . treaty . . . the claimant's property is taken for and appropriated to the public use. Spain is released; all her obligation to the claimant is cancelled. By the same instrument it is transferred to, and assumed by, the United States.").

> Obviously, to say that the second claim goes to the holder of the first is not to say that it is identical with the first—either in amount or in its general character as a "real estate" claim—much less in its character as a "right in immovable property" for the specific purpose of the FSIA.

Pet. App. 13a (footnote omitted).

The Court of Appeals' statement that "the second claim . . . is not . . . identical with the first" conflicts with the rule established by *Comegys* and *Bachman* concerning the *rights* affected by claims settlement treaties. In *Comegys*, Justice Story, writing for the Court, stated: "The *right to indemnity . . . is a right attached to the ownership of the property itself.* . . . [The treaty] recognized *an existing right* to compensation. . . ." 26 U.S. (1 Pet.) at 215-17 (emphasis added). In *Bachman*, the Court stated that "The claim established . . . *was manifestly the very claim*" which existed prior to the settlement treaty. 109 U.S. at 662 (emphasis added). In short, there is no "second" claim of right as the Court of Appeals assumed; rather, there is merely *one* claim, and more important, one right, "attached to the property," with the responsibility for payment of such claim transferred between sovereigns.[14]

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[14] The Court of Appeals also sought to distinguish *Comegys*

> in that the claim had already been adjudicated by an international commission and found to be meritorious *before* it was espoused. Thus, the holding does not even establish that an espoused but unadjudicated claim such as existed here necessarily leaves *any* post-settlement rights in the original claimant.

Pet. App. 13a n.6. The distinction drawn by the Court of Appeals between "already . . . adjudicated" but unsatisfied claims and "unadjudicated claim[s]" is without relevance. Petitioners know of no authority, and the Court of Appeals cited none, for the proposition that only "already . . . adjudicated" claims survive a claims settlement treaty. In any event, the distinction made by the Court of Appeals is inconsistent with *Bachman*, which adhered to the rule established by *Comegys*, although it dealt not with an "already . . . adjudicated" claim but with a claim which was un-

To support its conclusion that the 1941 Treaty extinguished Petitioners' rights, the Court of Appeals discusses the "principle . . . [that] a sovereign possesses the absolute power to assert the private claims of its nationals against another sovereign." Pet. App. 10a. It goes on to state that "[f]inal settlement between the sovereigns 'wipes out the underlying private debt,'" relying on Professor Henkin's treatise. Pet. App. 11a. It is clear from the context, however, that Professor Henkin was describing nothing more than what Petitioners concede occurred here: As a result of the 1941 Treaty, Petitioners' "recourse under domestic law" against the original obligors—here the United States and the State of Texas—was, indeed, intended to be wiped out. L. Henkin, *Foreign Affairs and the Constitution* 262 (1972). That the obligation of one sovereign debtor was eliminated, however, does not mean that the *right* of the claimant has likewise been extinguished.[15] Indeed, *Bachman* and

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adjudicated prior to the Treaty of Washington. In this sense, the claim asserted in *Bachman* is identical to the claims asserted by Petitioners and Petitioners' case should be governed by the *Comegys* rule. The Court of Appeals' failure even to mention *Bachman*, despite Petitioners' strong reliance on it below, undercuts its effort to limit the rule established by *Comegys*.

[15] Indeed, the recent trend, noted by Professor Henkin, is that the underlying right may be vindicated by a remedy under the Fifth Amendment. Henkin, *supra*, 259-66. Henkin specifically noted the decision in *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952), which lends "support to the view that making someone pay twice for some overriding foreign relations purpose, while not constitutionally impermissible, *constitutes a taking for a public use that requires just compensation; and, perhaps, if no compensation is forthcoming, the original taking becomes unlawful as a deprivation of property without due process of law.*" *Id.* at 261-62 (emphasis supplied). Moreover, as Henkin implies, if compensation is constitutionally required when an international agreement "reinstat[e]s claims against Americans that have been paid," then, so, too, should it be required when international agreements "nullif[y] claims by Americans that have not been paid." *Id.* at 262. *See Gray v. United States*, 21 Ct. Cl. 340 (1886) (Americans whose claims against France were relinquished by the United States in

Comegys demonstrate that the change in remedy worked by a claims settlement treaty does not extinguish the underlying private right.[16]

In *Comegys* and *Bachman*, the Supreme Court simply applied the traditional rule that the bundle of rights which a person holds over real or personal property includes not only the right to use, enjoy and possess such property, but to be compensated for it if wrongfully taken from him. "[A]ttached to the ownership of the property itself" is "[t]he right to indemnity." *Comegys v. Vasse*,

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the Treaty of 1800 had a right to compensation for their losses, though no remedy was then available); *Holbrook v. United States*, 21 Ct. Cl. 434 (1886); *Cushing v. United States*, 22 Ct. Cl. 1 (1886). More recently, in *Dames & Moore v. Regan*, 453 U.S. 654, 688-89 (1981), this Court specifically noted that it was not "appropriate at the present time to address petitioner's contention that the suspension of claims . . . would constitute a taking of property in violation of the Fifth Amendment to the United States Constitution in the absence of just compensation." *Id.* at 689. This Court held, however, that the "takings" claim could appropriately be brought before the U.S. Court of Claims pursuant to the Tucker Act, thus plainly indicating that the claim was neither frivolous nor foreclosed by prior decisions. Moreover, Justice Powell, in a separate opinion, made explicit his view that "The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts." *Id.* at 691.

[16] In the Court of Appeals' view, the 1941 Treaty, by providing Petitioners with a new remedy (*i.e.*, monetary compensation from Mexico rather than the return of land or monetary compensation from the United States) somehow simultaneously extinguished Petitioners' preexisting "rights in immovable property" situated in Texas. This view, reduced to its essence, holds that the "remedy" alters or qualifies the nature of the underlying property right. Yet, this view has been rejected by this Court in the context of a just compensation claim. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933). In *Jacobs*, commenting on the nature of the suit, the Court observed:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the

26 U.S. (1 Pet.) at 216. Thus, the Court of Appeals' reading of *Comegys* and *Bachman* is not only in conflict with these decisions but represents a departure from traditional common law conceptions as to the origin and nature of property rights. The basic and uncontroverted fact is that Petitioners' families were the owners of 12 million acres of land in Texas. As an essential incident of ownership, Petitioners' families were entitled to be compensated for any wrongful taking of their land, a right neither created nor extinguished by the 1941 Treaty. *Cf. United States v. Percheman*, 32 U.S. 51 (1833) (Marshall, C.J.) (rights of property remain undisturbed even in cases of conquest).

The Court of Appeals' search for the origin and nature of Petitioners' land compensation claims against Mexico need not have proceeded further than the very Texas lands for which Petitioners seek compensation. It is abundantly clear that all rights emanating from such lands, including the right to compensation for its taking, are rights in immovable property. See Part III, *infra*. The Court of Appeals' reliance on the 1941 Treaty to justify its contrary holding is in conflict with this Court's prior decisions, and thus suggests the need for review by this Court.

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exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. *The form of the remedy did not qualify the right.*

290 U.S. at 16 (emphasis added).

II. THE COURT OF APPEALS' INTERPRETATION OF THE 1941 TREATY TO DEFEAT JURISDICTION UNDER SECTION 1605(a)(4) OF THE FOREIGN SOVEREIGN IMMUNITIES ACT RAISES SERIOUS CONSTITUTIONAL ISSUES.

The circumstances surrounding the Petitioners' claims admittedly are unique.[17] It is indeed rare that a constitutional obligation under United States law to provide just compensation to American citizens for lands taken from them in the United States is transferred or assigned to a foreign sovereign by treaty or executive agreement. Yet, under the 1941 Treaty, this is precisely what occurred.[18]

Forty-three years have passed since the 1941 Treaty was signed. Unfortunately, the "Mexican sense of obligation" of which Mexico's counsel spoke in the District Court proceedings has not resulted in any fulfillment of that obligation to compensate the Petitioners. See note 18, *supra*. Prior to filing this action, the Petitioners made every good faith effort possible to secure compensation from Mexico through normal governmental channels. *See* Complaint ¶¶ 35-56, Pet. App. 55a-59a (allegations of extensive efforts to secure compensation from Mexico). This action followed when those efforts proved futile. It represents, in the Petitioners' view, the only remaining effort they can make to hold Mexico accounta-

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[17] *See Trustees Of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 644-45 (1819) ("although a particular and rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rule. . . . It is not enough to say, that this particular case was not in the mind of the Convention when the article was framed. . . .").

[18] Counsel for Mexico stated at oral argument in the District Court that: "We, really, here have two kinds of plaintiffs. We have two named Mexican representatives. . . . We also have U.S. citizens. . . . [T]he United States Government . . . relegat[ed] *its own citizens* to the Mexican sense of obligation." Tr. Oral Arg. at 24, 26 (Jan. 13, 1983) (emphasis added).

ble for payment of their claims, as the 1941 Treaty contemplated.

The Court of Appeals' holding that the 1941 Treaty "extinguished" Petitioners' property rights, will, if sustained, place the Petitioners in the position of having a conceded right to compensation for lands taken from them in Texas, but no effective remedy against Mexico to enforce that right. Under such circumstances, the question left open by this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), must be faced: If the remedy provided by a claims settlement treaty (here, payment by Mexico), is inadequate—as blatantly appears to be the case in view of Mexico's forty-three year failure to make payment—are not Petitioners entitled to reopen the issues the 1941 Treaty was intended to lay to rest and proceed directly against the United States to obtain the just compensation to which they are entitled under the U.S. Constitution? Decisions of the lower courts have expressly contemplated that the Constitution may require such a result, where a remedy envisioned by a claims settlement agreement proves to be ineffective.[19]

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[19] *See Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955). In *Seery* the Court posed the issue as follows: "[I]t is evident that . . . the plaintiff's property was taken under such circumstances that she was entitled under the Fifth Amendment . . . to be paid just compensation. We must now decide whether the [claims settlement] agreement [with Austria] took that right from her." *Id.* at 606. The United States argued that the settlement agreement had destroyed the plaintiff's right to compensation and, hence, there was no claim against it upon which her suit could be maintained. The Court, cognizant of the grave constitutional issue posed by the Government's argument, concluded that, "[i]t would be indeed incongruous" to interpret the settlement agreement as "destroy[ing] the Constitutional right of a citizen." 127 F. Supp. at 607. Thus, the Court held that her right, as an American citizen, against the United States was not extinguished by the claims settlement agreement. As a result, at least where the foreign sovereign had not provided compensation to the plaintiff, the United States could be called upon to make good its constitutional obligation to provide just compensation. *Id.* at 606-07. This squaring of a claims settlement agree-

The Court of Appeals' interpretation of the 1941 Treaty raises serious constitutional questions. Not only may these Petitioners have a constitutional basis for proceeding directly against the United States (in contravention of the intent of the 1941 Treaty), but other claimants represented by the United States itself in other international proceedings may also have Fifth Amendment claims against the United States. If claims settlement treaties completely "extinguish" preexisting rights —rather than transferring the obligation to satisfy such rights between sovereigns—then it is difficult to avoid the conclusion that a "taking" has occurred for which just compensation must be provided under the Fifth Amendment. This result, obviously unforeseen by the Court of Appeals in a holding tailored to avoid judicial consideration of the historically unique claims of Petitioners, would have significant implications for the conduct of American foreign policy.

In sum, the Court of Appeals' holding, while barring the Petitioners from seeking relief against Mexico, necessarily opens up a new avenue of redress for them directly against the United States in the Court of Claims.[20] Of course, claims settlement agreements are intended to avoid this result. A proper construction of the 1941

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ment with the Fifth Amendment right of a citizen to just compensation avoided the serious constitutional issue inherent in the Government's argument that the plaintiff's claims had been totally destroyed by the settlement agreement.

[20] The Court of Appeals' construction of § 1605(a)(4) results in the total denial of access to a judicial forum against Mexico and raises due process concerns, since there is serious doubt as to whether Congress can constitutionally deny American citizens a judicial forum to resolve disputes which involve the taking of U.S. real property rights. *See generally* Brilmayer & Underhill, *Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules and the Conflict of Laws*, 69 Va. L. Rev. 819 (1983); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953).

Treaty, to recognize that Petitioners' preexisting rights survived but must now be satisfied by Mexico, is not only consistent with *Comegys* and *Bachman* but also avoids these difficult constitutional questions.[21]

III. THE COURT OF APPEALS' CONSTRUCTION OF SECTION 1605(a)(4) IS INCONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THIS IMPORTANT JURISDICTIONAL STATUTE.

While the principal basis for the Court of Appeals' conclusion was its view that the 1941 Treaty had "extinguished" any preexisting property rights of the Petitioners, it also implied more generally that land com-

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[21] This Court has recently reiterated that statutes should be construed to avoid constitutional questions, and in particular, that courts "should decline to construe [statutes] in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the takings clause." *United States v. Security Industrial Bank*, 459 U.S. 70, 82 (1982) (quoting *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979)). In *Security Industrial Bank*, construing a provision of the Bankruptcy Reform Act retroactively would have resulted in the complete destruction of a lien interest in household goods. This Court, sensitive to the taking that would result if the Act were thus applied, construed it to apply prospectively, thus avoiding the Fifth Amendment issue. Here, Petitioners' right to compensation for their land is one of the rights emanating from their ownership of the land. The Court of Appeals' decision that petitioners' rights were extinguished by the 1941 Treaty, and that there was no jurisdiction under the FSIA, is neither required nor even supported by the relevant statutory materials nor by this Court's prior decisions. A recognition that the 1941 Treaty merely limited the remedy, and did not extinguish Petitioners' preexisting land compensation rights, would permit the lower courts to exercise jurisdiction in this case, and proceed to an examination of the merits. *Cf. Seery v. United States*, 127 F. Supp. 601, 607 (Ct. Cl. 1955) (recognition that defeating jurisdiction on basis of interpretation of settlement agreement as extinguishing property rights would effectively "destroy the Constitutional right of a citizen" and raise serious constitutional issue).

pensation claims—that is, money claims for the value of real property—were simply not within the scope of the "immovable property" clause. Its interpretation of that clause, and of the FSIA's legislative history, is completely erroneous, and unsupported by the very authorities it cites.

The plain language of the immovable property clause of the FSIA clearly extends jurisdiction to any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The FSIA's legislative history, though sparse, indicates that Congress intended to confer jurisdiction to "adjudicate questions of ownership, *rent*, servitudes *and similar matters*." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6619 (hereinafter "House Report") (emphasis added). Petitioners had argued below that the 1941 Treaty did not change the "immovable" character of the bundle of rights they derived from their Texas lands, including the right to compensation for such lands, but simply affected their remedy by transferring the obligation to provide just compensation for their lost Texas lands from the United States to Mexico. In support, Petitioners noted that in both common law and civil law jurisdictions, the right to compensation for real property is treated as a real or immovable property right. Thus, their compensation claims for their Texas lands fell squarely within the purview of § 1605(a)(4) which reaches any case in which "rights in immovable property . . . are in issue." Petitioners further argued that since a "rent" claim for the temporary use of real property was intended to be within the jurisdiction established by § 1605(a)(4), then surely a compensation claim for the permanent loss of land itself, a "similar matter," was also included.

The Court of Appeals began its analysis of the reach of § 1605(a)(4), however, not with the words of the

statute, nor even with the legislative history directly bearing on the immovable property clause of § 1605(a)(4). Rather, it began with the proposition that the pre-FSIA "restrictive theory" of immunity would supply the answer, and moved from there to the "local action" rule, concluding that only cases "directly implicating" property interests in the United States were intended to be included. Apart from the fact that this analysis begs the very question presented—whether Petitioners' rights to compensation are real property rights—it is even more fundamentally flawed.

Congress' overriding purpose in enacting the FSIA was to assure that immunity determinations would "henceforth" be made in conformity with its express legal standards. *See* 28 U.S.C. § 1602. It was to remedy the *lack* of "comprehensive," governing standards concerning the sovereign immunity defense that Congress spent several years crafting the precise language of the FSIA. House Report at 7, 1976 U.S. Code Cong. & Ad. News 6605; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1982) (restrictive theory standards neither "clear nor uniformly applied"). Congress specifically directed that "[c]laims of foreign states to immunity should henceforth be decided . . . in conformity with the principles set forth in" the FSIA. 28 U.S.C. § 1602. Yet, the Court of Appeals eschewed the express legal standards of the FSIA, sought to evade the clear import of the relevant legislative history concerning the intended scope of the immovable property clause, and completely ignored the primary source for defining the nature and character of Petitioners' property rights—state law. The contorted and narrow reading the Court of Appeals gave § 1605(a)(4) is reminiscent of the unpredictable immunity decisions rendered by the State Department. This approach, which the FSIA was intended to supplant, should not be sanctioned by this Court.

A. Under Applicable State Law And The FSIA's Legislative History, A Right To Compensation For Real Property Is A "Right In Immovable Property."

The Court of Appeals opened its analysis by rejecting Petitioners' reliance on state law to give meaning to the plain statutory terms used by Congress in § 1605(a)(4). *See* Pet. App. 7a (eschews effort to obtain "artificial consensus" on meaning of "immovable property"). Yet, the general rule in this country is that the nature of property rights are determined by reference to state law. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Court stated:

> Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims or entitlement to those benefits.

The distinction between "immovable" property rights and other property rights is not a major feature of federal law, and it thus seems evident that Congress intended the term used in the statute to be construed primarily by reference to state law.[22]

The "immovable" character of Petitioners' land compensation claims is amply demonstrated by resort to either common or civil law precedents. It has long been recognized in the common law that, in situations like the present, where land rights have been taken, a compensation fund created after extinguishment of title retains the character of real or immovable property. As a leading commentator summarized:

> A fund derived from a payment by the city for lands taken for school purposes for the benefit of

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[22] In passing the FSIA, Congress expressly stated that "[t]he bill is not intended to affect the substantive law of liability." House Report at 12, 1976 U.S. Code Cong. & Ad. News 6610.

> unknown owners must be treated as real estate. Also, insurance money realized from the destruction of buildings on devised real estate will be treated as real property. Upon a conveyance of land by the executor of a testator in pursuance of an option given by the testator during his lifetime, the proceeds of the sale pass as real estate. The proceeds of the sale of real estate, made by decree of court in a partition suit, retain the character of real estate for the purposes of distribution. *Likewise, where there is a compulsory conversion of real estate, as in the exercise of the power of eminent domain, and without the consent or against the will of the owner of the fee, the compensation awarded will be treated as real estate until the owner, being sui juris, accepts it as personal property.*

1 G. Thompson, *Commentaries on the Modern Law of Real Property* § 19 at 83 (1980 Replacement) (emphasis added and citations omitted).[23]

Looking to civil law authorities, where the phrase "immovable property" is more commonly found,[24] it is equally clear that a right to compensation for land would be treated as a "right in immovable property." *See Clarke v. Brecheen*, 387 So. 2d 1297, 1301 (La. Ct. App. 1980) (rights in immovable property include "two basic

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[23] Under Texas law in particular, it appears that claims to compensation for the taking of land would be regarded as real property rights, subject, for example, to the laws of succession governing the transmission of real property. *See Toledo Soc'y for Crippled Children v. Hickok*, 152 Tex. 578, 261 S.W.2d 692 (1953), *cert. denied*, 347 U.S. 936 (1954) (law of situs of land to which rights relate determines nature of succession rights); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364, 366 (4th Cir. 1968) (under Texas law right to future royalty payments is interest in land).

[24] *See 2 Tudor City Place Assoc. v. Libyan Arab Republic Mission*, 121 Misc. 2d 945, 470 N.Y.S.2d 301, 304 (N.Y. City Civ. Ct. 1983) ("immovable property" in § 1605(a)(4) used in the civil law sense).

rights—the right to possess, use and enjoy the property *and the right to receive the fruits produced by the property.*") (emphasis added). Indeed, under civil law, "rights in immovable property" include a broad range of usufructuary or beneficial interests derived from land, *e.g.* leases, licenses, rents, mineral rights, easements, royalties and profits. *See, e.g.*, La. Civ. Code Ann. art. 535 (West 1980).

The conclusion suggested by state law is reinforced by the legislative history of the FSIA. As noted above, Congress did express its view that "questions of . . . ownership, *rent*, servitudes, *and similar matters*" were within the jurisdictional grant for actions involving "rights in immovable property."[25] If a mere rent claim for the temporary use of land suffices for jurisdiction under § 1605(a)(4), then *a fortiori* Petitioners' claims for payment for the permanent loss of their land suffice as well.[26]

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[25] *See County Bd. v. German Democratic Republic*, No. 78-293-A (E.D. Va. Sept. 6, 1978) *reprinted in* 17 *Int'l Legal Mat'ls* 1404-06 (1978) (§ 1605(a)(4) jurisdiction found where county sought to collect real property taxes and assert tax lien on apartment building owned by the German Democratic Republic). Petitioners' case is even stronger than *German Democratic Republic* since there the taxes due merely related to the land while here the funds due replace the land.

[26] The Court of Appeals, without any support in the language of the FSIA or its legislative history, attempted to limit the scope of § 1605(a)(4) to only those money claims that were for rent. Thus, it stated: "It is true that an action for rent does not always call into question either ownership or possessory rights. . . . However, the related local action rule has been applied to [some] rent suits. . . . [A]ctions for rent frequently involve issues of title and possession, *and have been given distinctive jurisdictional treatment for that reason.*" 735 F.2d at 1522 n.5, Pet. App. 9a n.5. To begin with, the legislative history's reference to "rent . . . *and similar matters*" is inconsistent with the Court of Appeals' apparent view that land compensation claims are not within the scope of § 1605(a)(4). Moreover, there is absolutely no indication in the

As these authorities demonstrate, both the express language used in the FSIA (as interpreted by state courts) and the language used by Congress in the legislative history pertaining to § 1605(a)(4), indicate that the District Court was correct in concluding that this section extends to cases to "recover money derivative of real property rights." 561 F. Supp. at 1196, Pet. App. 28a. The Court of Appeals' contrary conclusion was erroneous, and unsupported by its own rationale.[27]

B. The Rationale Of The "Local Action Rule" Supports The Exercise Of Jurisdiction By An American Court In This Case.

The Court of Appeals asserted that the "restrictive theory" of immunity relating to real property actions arises from and should thus be measured by the "local

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legislative history that Congress intended "distinctive jurisdictional treatment" for rent claims. Indeed, the Court noted that "[t]he parties have not cited, and we have not found, any cases *either before or after the FSIA* dealing with the application of sovereign immunity to actions for rent against foreign sovereigns." Pet. App. 9a n.5. This fact further undercuts the Court's assertion that Congress intended "distinctive jurisdictional treatment" for such claims.

[27] The Court of Appeals' narrow construction of § 1605(a)(4) also conflicts with the general rule established by this Court that a jurisdictional statute like the FSIA should be construed in accordance with its express terms unless the statute's legislative history reflects a clear intention by Congress to limit its scope. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 580-81 (1982) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive. . . . Jurisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes. . . . In short, the plain language of [the statute] controls its construction, at least in the absence of 'clear evidence' . . . of a 'clearly expressed legislative intention to the contrary. . . .'" (quoting *Palmore v. United States*, 411 U.S. 389, 396 (1973); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

action" rule. Yet this rule, nowhere referred to in the FSIA or in its legislative history, is not only of dubious relevance in interpreting the "immovable property" clause, but it in fact supports Petitioners' view of that clause.

According to the court below, the "local action rule" makes the "locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate." Pet. App. 8a. The foundation of this rule, as well as of the "traditional exception [from sovereign immunity] limited to questions involving property interests or possession," according to the Court of Appeals, is two-fold: first, "[a] territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain," and second, "[c]ourts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." Pet. App. 8a.

To the extent that the "local action" rule is even relevant,[28] its rationale supports Petitioners' view that their claims against Mexico are properly resolved by American courts. These claims inherently involve issues of title to lands in Texas, and successorship rights under Texas law to the compensation owed for such lands. Applying the inheritance laws of Texas concerning real property interests, and determining the title to and value of Texas land, are precisely the kinds of issues peculiarly within an American court's competence.

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[28] Some of the cases cited by the court below involved venue. *See, e.g., Pace v. Ott*, 189 Okla. 230, 115 P.2d 253 (1941). Congress' enactment of special venue provisions which permit the filing of any action, even one involving "rights in immovable property" relating to Texas lands, in the United States District Court for the District of Columbia, 28 U.S.C. § 1391(f)(4), eliminated any applicability of the local action venue rule to actions under the FSIA against foreign sovereigns. Even were the local action rule applicable, however, it would simply require adjudication of the claims in Texas, but would not support a sovereign immunity defense.

C. Where It Is Necessary To Adjudicate Title Claims To Texas Land To Resolve The Merits Of A Dispute, The Express Language Of Section 1605(a)(4) Confers Jurisdiction.

Although the Court of Appeals recognized that "the issue whether appellants' predecessors . . . ever in fact held title to these lands would, presumably, be relevant to their entitlement to compensation from Mexico," Pet. App. 12a, it regarded such issues as "historical" only. Even though such questions of title would be "in issue" in the litigation, it evidently believed that this was not sufficient, and that some special determination of the nature of the rights asserted by Petitioners was required solely for the purpose of determining jurisdiction. *See* Pet. App. 7a, 13a. Petitioners know of no authority for this view, nor did the Court cite any.

Indeed, this view is squarely contrary to § 1605(a)(4), which provides jurisdiction in any case "in which . . . rights in immovable property . . . are *in issue*." (emphasis added). The clear mandate of this language is that the nature of the rights be determined by reference to their nature when they are "in issue" between the parties —that is, for purposes of resolving the merits of the dispute. As the court below recognized, the title of Petitioners' ancestors, as well as Petitioners' inheritance rights under Texas real property law, will plainly be "in issue." Such rights are clearly "rights in immovable property," under any theory.

More important, however, is the bedrock fact that Petitioners today are seeking compensation for the taking of their land in Texas. In codifying the defense of foreign sovereign immunity, Congress could not have intended to extend immunity to a foreign state that owes compensation to American citizens for a taking of their United States' land. Petitioners' rights to compensation are "rights in immovable property," under any applica-

ble authority. And the 1941 Treaty no more extinguished these "rights" than did the Treaty of Washington at issue in *Bachman* or the 1819 Treaty with Spain at issue in *Comegys*.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully submit that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROBERT J. SALAZAR
RUSSELL E. VIGIL
650 Lawrence Street Center
1380 Lawrence Street
Denver, Colorado 80204

MITCHELL ROGOVIN *
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

JESS J. ARAUJO
DIMARCO & ARAUJO
A Professional
Law Corporation
1015 North Broadway
Santa Ana, California 92701

* Counsel of Record

Of Counsel:
JOAQUIN G. AVILA
MORRIS J. BALLER
MEXICAN-AMERICAN LEGAL
DEFENSE & EDUCATION FUND
28 Geary Street
San Francisco, California 94108

84-992

No.

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FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASOCIACION DE RECLAMANTES, AMINTA ZARATE, LUIS RIOJAS, FELIPA FLORES BENAVIDEZ, MARIA AGUIRRE DE SCHULTZ, NIEVES GUERRERO CHAPA, SANTOS ZARATE PRIETO,

Petitioners,

v.

THE UNITED MEXICAN STATES,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT J. SALAZAR
RUSSELL E. VIGIL
650 Lawrence Street Center
1380 Lawrence Street
Denver, CO 80204

MITCHELL ROGOVIN *
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
ROGOVIN, HUGE & LENZNER
A Professional Corporation
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

JESS J. ARAUJO
DIMARCO & ARAUJO
A Professional Law Corporation
1015 North Broadway
Santa Ana, CA 92701

Of Counsel
JOAQUIN G. AVILA
MORRIS J. BALLER
MEXICAN-AMERICAN LEGAL DEFENSE & EDUCATION FUND
28 Geary Street
San Francisco, CA 94108

* Counsel of Record

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1596

ASOCIACION DE RECLAMANTES, *et al.*,
Appellants

v.

THE UNITED MEXICAN STATES

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 81-02299)

Argued March 23, 1984

Decided June 5, 1984

Vicki C. Jackson with whom *Robert J. Salazar, Russell E. Vigil, Mitchell Rogovin, George T. Frampton, Jr.*, and *Jess J. Araujo* were on the brief, for appellants.

John H. Shenefield with whom *Eric L. Richard* and *D. Stephen Mathias* were on the brief, for appellee.

Before: EDWARDS and SCALIA, *Circuit Judges*, and SWYGERT,* *Senior Circuit Judge* for the United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Circuit Judge* SCALIA.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Concurring statement filed by *Circuit Judge* EDWARDS.

SCALIA, *Circuit Judge*: This case comes before us on appeal from an order of the District Court dismissing appellants' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). It presents the issue of interpreting the "immovable property" exception and the "tortious act" exception to sovereign immunity contained in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1605(a)(4) & (5) (1982).

I

Appellants, six individuals and the Asociacion de Reclamantes, claim [1] to be or to represent the successors in interest to recipients of 433 land grants from the King of Spain or the Republic of Mexico, covering some 12 million acres now located in the State of Texas, valued in 1925 at close to $200 million. The original grantees, Spanish and Mexican citizens, were allegedly driven from their land and divested of title by the United States and Texas in the period following the Mexican-American War. Those landowners, whose rights to title and use of their Texas land were explicitly protected by the Treaty of Guadalupe Hidalgo, Feb. 2, 1948, United States-Mexico, 9 Stat. 922, T.S. No. 207, Art. VIII, may have possessed, at that time, actionable claims against the United States for the restoration of title and possession.

The complaint does not allege that those claims were ever pursued in United States courts. Rather, in the early 1920's, a new Mexican government, headed by General Obregon, espoused the claims and asserted them against the United States in negotiations between the two sovereigns. On September 8, 1923, Mexico and the United

[1] Although for purposes of a Rule 12(b)(1) motion we need not accept as true the plaintiffs' version of controverted jurisdictional facts, *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981), appellee has not contested the historical account proffered by appellants and set forth here.

States concluded the Treaty on General Claims, United States-Mexico, 43 Stat. 1730, T.S. No. 678, which empower a General Claims Commission to evaluate the claims of each country's nationals raised in the negotiations. Mexico filed with the Commission all 433 land claims at issue here, but by 1936, when the authority to hear claims expired,[2] none had been evaluated.

In 1938, new disputes between Mexico and the United States arose when Mexico expropriated without compensation oil-producing property owned by American citizens. Negotiations between the two sovereigns were resumed, and the 433 land claims were again on the bargaining table. Those negotiations culminated in the Treaty on Final Settlement of Certain Claims, United States-Mexico, 56 Stat. 1347, T.S. No. 980 (Nov. 19, 1941) (the "1941 Treaty"). By the terms of that treaty, Mexico released the United States from liability on all claims—including the 433 Texas land claims—asserted by Mexico against the United States. In addition, Mexico paid the United States a lump-sum $40 million and was absolved of liability on all claims maintained against it. Each sovereign assumed the obligation to satisfy the espoused claims of its own nationals, which the United States did within seven years. Shortly after the Treaty was signed, Mexico acknowledged its obligation by presidential decree, Decree of President Manuel Avila Camacho, Dec. 9, 1941, *published* in El Diario Oficial, Dec. 31, 1941, and assurances have been made by the Mexican government to individual appellants as recently as 1970 that compensation would be forthcoming.

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[2] The General Claims Commission heard cases until 1931. Pursuant to the General Claims Protocol of April 24, 1934, United States-Mexico, 49 Stat. 3531, E.A.S. No. 57, claims not decided by the Claims Commission were transferred to two appraisers, whose authority to evaluate the claims was to last until June 30, 1936.

Nevertheless, over forty years after the 1941 Treaty, Mexico has failed to pay a single claim. Nor has it legislated any mechanism for adjudicating or funding the claims. In this action appellants seek damages from the Mexican sovereign for its uncompensated taking of the Texas land claims. They also ask the court to place all monies paid in satisfaction of Mexico's liability into a fund, and to supervise its distribution. Appellants allege jurisdiction under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (1982), which creates exceptions to soverign immunity for actions involving rights to immovable property located within the United States and for actions for torts committed within the jurisdiction of the United States.

The District Court found jurisdiction lacking and dismissed the complaint. The District Court also held, alternatively, that the Act of State doctrine would prohibit adjudication of the merits of the complaint even if jurisdiction existed. We agree that the FSIA grants immunity to Mexico in this matter and affirm the District Court for that reason. We have no need—and, because we lack jurisdiction, no power—to reach the Act of State issue.

II

The FSIA provides the sole basis for subject matter jurisdiction over suits against foreign states. 28 U.S.C. §§ 1330, 1604. The Act was intended to codify the so-called "restrictive" principle of sovereign immunity, under which foreign sovereigns are accorded immunity with regard to their sovereign or public acts (*actiones jure imperii*), but not with respect to their commercial acts (*actiones jure gestionis*), and in addition to withhold immunity for certain narrowly defined public acts for which local adjudication was deemed imperative (*e.g.*, traffic accidents caused by employees and officials of a foreign embassy). H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 20-21, *reprinted in* 1976 U.S. CODE CONG. & AD.

NEWS 6605, 6619-20 (hereinafter "House Report").[3] The Act sets forth as the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604; and then creates exceptions to that immunity for specific categories of cases.

Appellants do not allege that Mexico's conduct in this case was commercial or private in nature. Thus, the largest and most important exception to immunity, for a foreign sovereign's commercial activities having some nexus with the United States, 28 U.S.C. § 1605(a)(2), is not at issue. Instead, appellants stake their case on two relatively minor exceptions to immunity that apply to public as well as private acts. We consider each of these in turn.

A. *The "Immovable Property" Exception—§ 1605(a)(4).*

Appellants contend that their causes of action against Mexico fall within the exception to foreign sovereign immunity for "any case in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Appellants do not now seek to have any land restored to them; rather, they argue that their rights to be compensated by Mexico for its taking of their prior rights (against the United States) to title and possession of the 433 tracts in Texas constitute "rights in immovable property" for purposes of this exception. The issue is one of statutory interpretation: whether Congress, in enacting the FSIA, intended the phrase "rights

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[3] Amid the confusion of the last few days of the 94th Congress two identical foreign sovereign immunity bills were passed and presented to the President for signature. The President signed the House bill, H.R. 11315, and vetoed the Senate bill, S. 3553, for technical reasons. (The President expressed doubt that the Senate bill had been properly enrolled because the Senate, after it had passed the House bill, had attempted unsuccessfully to rescind the prior passage of its own bill. 122 CONG. REC. 35082 (1976).) For this reason, we do not cite the Senate Report which is, in any event, identical to its House counterpart.

in immovable property" to be broad enough to encompass rights to compensation traceable historically to disputes over title to American land, which disputes have been settled by international agreement.

The District Court apparently agreed with appellants' broad reading of the exception, believing jurisdiction to exist if the suit "involves an action to quiet title *or to recover money derivative of real property rights.*" *Asociacian* [*sic*] *de Reclamantes v. The United Mexican States*, 561 F. Supp. 1190, 1196 (D.D.C. 1983) (emphasis added).[4] Appellants support that expansive reading, arguing that the statutory language "rights in immovable property," is broad enough to accommodate their "interest" in the Texas land. They point out that the same term is elsewhere afforded a scope which they assert is expansive enough to include their compensation claims: *e.g.*, at civil law (where it includes leases, licenses, rents, mineral rights, easements, royalties and profits, LA. CIV. CODE ANN. art. 535 (West 1980)) and in the law of eminent domain (where the compensation awarded for the compulsory conversion of real estate "will be treated as real estate until the owner, being *sui juris*, accepts it as personal property," 1 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY, § 19 at 83 (1980 Replacement) (footnote omitted)). Appellants also claim to find support for a broad interpretation in the

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[4] The District Court held that even this broad reading of the immovable property exception did not cover this suit, and that the claims involved mere "intangible property rights created through the diplomatic process," because appellants had not alleged that they (or, presumably, their predecessors in interest) had title to the land in 1923, when the United States-Mexico claims negotiations took place, or that they had attempted to regain title in a legal forum prior to that time. 561 F. Supp. at 1196-97. We reject that analysis because such allegations did appear in an Exhibit to the Complaint, *see* Amended Complaint, Exhibit B, which is sufficient. Fed. R. Civ. P. 10(c); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), *cert. denied*, 441 U.S. 952 (1979).

legislative history of the FSIA: "[A] foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters . . . ." House Report, *supra*, at 20, 1976 U.S. CODE CONG. & AD. NEWS 6619.

Admittedly, the term "rights in immovable property" is an imprecise one, susceptible of as many different meanings as there are areas of law for which that characterization of an interest may be relevant. *See* 1 G. THOMPSON, *supra*, at § 19. Our job, however, is not to give the term the most expansive reading possible, nor to extract from different sources of law an artificial consensus definition of the term, but to determine what Congress meant by the language in this particular statute. Our reading of the legislative history and understanding of the purposes of the FSIA counsel a far narrower construction of the term than that advanced by appellants.

The immovable property exception was enacted to codify, with minor modifications not relevant here, the pre-existing real property exception to sovereign immunity recognized by international practice. *See* House Report, *supra*, at 20, 1976 U.S. CODE CONG. & AD. NEWS 6620, *referring to* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, 26 Dept. of State Bulletin 984 (1952), *reprinted in Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315, Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 54-55 (1976). That practice declined to extend the immunity of a foreign sovereign to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 68(b) (1965). *Accord*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 455(1)(c) & comment b (Tent. Draft No. 2, 1981). Thus, a foreign sovereign was not

immune in an eminent domain proceeding involving its property, but was immune in a negligence suit for injury suffered by a private individual while on its property. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra*, at § 68 comment d.

The origin of the traditional exception limited to questions involving property interests or possession is self-evident. A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. As romantically expressed in an early treatise:

> A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.

1 F. WHARTON, CONFLICT OF LAWS § 278 at 636 (3d ed. 1905). A subsidiary concern, less instinctive and mystical, is that courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation. *See Reasor-Hill Corp. v. Harrison*, 220 Ark. 521, 523, 249 S.W.2d 994, 995 (1952). These considerations produced not only the exception to sovereign immunity we are here discussing, but also the "local action rule," which makes the locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate. *Griner v. Trevino*, 207 S.W. 947, 949-50 (Tex. Civ. App. 1918); 1 G. THOMPSON, *supra*, § 4 at 24 (citing cases). The latter, like the former, is limited to questions that directly implicate interests in the property or rights to possession. *Compare, e.g., Pace v. Ott*, 189 Okla. 230, 231, 115 P.2d 253, 255 (1941) (action for damages to land sustained by oil and salt water pollution is not a local action), and *Wise v. Isenhour*, 9 N.C. App. 237, 239, 175 S.E.2d 772, 773 (1970)

(action for damages against builders for breach of construction contract is not a local action), *with, e.g., Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811) (No. 8,411) (action for trespass is a local action), and *Wilson v. Kryger*, 29 N.D. 28, 34, 149 N.W. 721, 723-24 (1914) (action to determine adverse claims to real property is a local action). *See also* 21 C.J.S. *Courts* §§ 45-49 (1940). The two doctrines are obviously complementary, since the local action rule without the real property exception to sovereign immunity would mean that real property disputes involving foreign sovereigns could not be resolved in any court.

That § 1605(a)(4), like the traditional real property exception it was intended to codify, is limited to disputes directly implicating property interests or rights to possession is consistent with the examples of its application mentioned in the House Report and cited by appellants: suits involving "questions of ownership, rent, servitudes," House Report, *supra*, at 20, 1976 U.S. CODE CONG. & AD. NEWS 6619.[5] It is also consistent with the single case

[5] It is true that an action for rent does not always call into question either ownership or possessory rights—though the remedy for nonpayment certainly does where the tenant is still in possession. The parties have not cited, and we have not found, any cases either before or after the FSIA dealing with the application of sovereign immunity to actions for rent against foreign sovereigns. However, the related local action rule has been applied to rent suits. According to Tiffany, it would apply or not apply depending upon whether the suit involved only assignees of the parties to the original lease (and was thus based only on privity of estate) or rather involved the original parties to the contract. 3 H. TIFFANY, REAL PROPERTY § 911 at 582 (3d ed. 1939). If this is in fact a general distinction, it is assuredly not one that all courts have followed. Some, for example, appear to apply the local action rule to only those rent suits in which title is in dispute. *See, e.g., Prospect Point Land Improvement Co. v. Jackson*, 109 N.J.L. 385, 387, 162 A. 576, 577 (1932); *California v. Royal Consolidated Mining Co.*, 187 Cal. 343, 351, 202 P. 133, 136-37 (1921). We need not inquire further into this fascinating issue; or into the more consequential issue of whether the FSIA was intended merely to

cited by appellants interpreting § 1605(a)(4), *County Board v. Government of the German Democratic Republic*, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978), *reprinted in* 17 Int'l Legal Materials 1404 (1978). In that case a county taxing authority in the United States sued a foreign sovereign for delinquent real estate taxes. An amendment to the complaint added a prayer for declaratory judgment that the property in question was subject to the state's statutory tax lien in favor of the county. On the issue of amenability to suit under § 1605(a)(4) the court held:

> Whether or not the issue of rights in immovable property is present under the original pleadings, after the amendment of pleadings being allowed below, the issue will be a specific matter for the court's attention in determining the question of the county's lien . . . .

Id. at 1405.

To see that appellants' claims against Mexico are not of the character involving property interests or possession to which the § 1605(a)(4) exception attaches, it is useful to review the manner in which those claims originated. Under well-established principles of international law, a sovereign possesses the absolute power to assert the private claims of its nationals against another sovereign. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CON-

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codify the preexisting exception to sovereign immunity in rent cases (whatever the scope of that might have been), or to extend that exception to all rent cases, or perhaps (though it seems unlikely) by the mere mention of the single word "rent" in the legislative history to create an entirely new exception where none existed before. The point for present purposes is that actions for rent frequently involve issues of title and possession, and have been given distinctive jurisdictional treatment for that reason. Reference to such actions in the legislative history of the FSIA thus does not establish any departure from the traditional principle that the real estate exception to sovereign immunity is bounded by concern for those issues.

STITUTION 262-63 (1972); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra*, at § 212. This authority to espouse claims does not depend on the consent of the private claimholder, *id.* at § 213, and the fact that a claim has been espoused provides a complete defense for the defendant sovereign in any action by the private individual, *id.* at § 205. Once it has espoused a claim, the sovereign has wide-ranging discretion in disposing of it. It may compromise it, seek to enforce it, or waive it entirely. *See Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981); Administrative Decision No. V (United States v. Germany), Mixed Claims Commission, 1924, [1923-25] Ad. Decisions and Ops. 145, 190, 7 U.N. Rep. Int'l Arb. Awards 119, 152. Final settlement between the sovereigns "wipe[s] out the underlying private debt," L. HENKIN, *supra*, at 262, and releases the defendant sovereign from all obligation except such as the settlement agreement may provide. In the present case, it may well be that Mexico, in settling or waiving the private claims, obligated itself under its own law to its nationals whose claims it had asserted. This obligation, however, differs from the legal obligation that arose from the wrongful taking (wrongful under the law of the United States or Texas or under the Treaty of Guadalupe Hidalgo) and that was settled by the 1941 Treaty, in several crucial respects: it is owed by a different sovereign and derives from the application of different law to entirely dissimilar and distinct sovereign acts.

Against this background it is clear that the compensation rights asserted here are not remotely "rights in immovable property" within the meaning of § 1605(a)(4). They are not property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land. Neither the title to, nor the use of the Texas lands can conceivably be affected by the outcome of this suit. Appellants' predecessors in interest possessed a

claim to title and possession, undoubtedly a "right in immovable property" at the time. Those property claims, however, were extinguished by the 1941 Treaty. That other obligations may have arisen in connection with the Treaty does not alter the fact that questions of title, possession and even compensation as between the original disputants, the United States and appellants' predecessors in interest, ceased to exist after 1941. It is true that the issue whether appellants' predecessors in interest ever in fact held title to these lands would, presumably, be relevant to their entitlement to compensation from Mexico. But that issue is, as far as the United States is concerned, purely of historical interest, having no bearing upon present property interests or possessory rights in its territory. The principal state interest that underlies the real property exception to sovereign immunity is therefore not implicated—as is evident from the fact that the 1941 Treaty, by providing for compensation of the private claimants by Mexico, implicitly acknowledged that state's right to resolve this historical point.

Appellants rely on *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), for the proposition that "payment [of a claim] under a claims settlement treaty . . . [is properly viewed as] an indemnification for the violation of a pre-existing property right." Appellant's Brief at 15. That is undoubtedly so, but does not resolve the issue here: whether the right to indemnification is in the nature of a real property right for purposes of the FSIA. In *Comegys* the United States was in the position of Mexico here: It had espoused claims against Spain and settled them, producing an obligation on its part (under the terms of the settlement treaty) to indemnify the original claim-holders. The case involved a claim-holder who had made an assignment in bankruptcy *before* the United States had espoused the claim; and the issue was whether the indemnification should be paid to him or to the assignee. The Court held, reasonably enough, that the indemnification was not a "donation or gratuity," 26

U.S. at 217, but was rather sufficiently attributable to the claim against Spain that it should go where that went—to the assignee in bankruptcy. Obviously, to say that the second claim goes to the holder of the first is not to say that it is identical with the first—either in amount or in its general character as a "real estate" claim—much less in its character as a "right in immovable property" for the specific purpose of the FSIA.[6]

In summary, while appellants may possess claims against Mexico for its uncompensated taking of previously held Texas land claims, resolution of those claims will not in any conceivable way affect property interests in, or rights to possession of, land located in the United States. Accordingly, the claims are not "rights in immovable property," within the meaning of 28 U.S.C. § 1605(a)(4).

B. *The "Tortious Act" Exception—§ 1605(a)(5).*

Appellants assert alternatively that jurisdiction over Mexico exists under § 1605(a)(5). That paragraph creates an exception to foreign sovereign immunity for cases

> not otherwise encompassed [by the exception for a foreign state's commercial activity], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, *occurring in the United States and caused by the tortious act or omission of that foreign state* or of any official or employee of that foreign state while acting within the scope of his office or employment . . . .

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[6] *Comegys* also differed from the present case in that the claim had already been adjudicated by an international commission and found to be meritorious *before* it was espoused. Thus, the holding does not even establish that an espoused but unadjudicated claim such as existed here necessarily leaves *any* post-settlement rights in the original claimant. *Cf. Dames & Moore v. Regan, supra,* 453 U.S. at 688 n.14 (Court declines to decide whether U.S. citizen has a taking claim against United States when his unadjudicated private claim is waived or settled for less than fair value).

(Emphasis added.) Appellants claim that Mexico's failure to compensate them for its taking and use of their Texas land claims is a violation of international and domestic (presumably Mexican) law, and thus wrongful and "tortious" within the scope of § 1605(a)(5).

We need not pause to consider whether Mexico has engaged in tortious conduct under applicable law, or which law might be applicable, because it is clear that the conduct complained of lacks the required nexus with the United States.[7] Although the statutory provision is susceptible of the interpretation that only the effect of the tortious action need occur here, where Congress intended such a result elsewhere in the FSIA it said so more explicitly. *See* 28 U.S.C. § 1605(a)(2) (immunity withheld for acts "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"). The legislative history makes clear that for the exception of § 1605(a)(5) to apply "the tortious act or omission must occur within the jurisdiction of the United States." House Report, *supra*, at 21, 1976 U.S. CODE CONG. & AD. NEWS 6619. We have recently so held. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842 (D.C. Cir. 1984).

It is not contended in the present case that any of Mexico's acts that could conceivably be regarded as having been committed on United States soil—the espousal, presentation and settlement of the claims—was in and of itself tortious. The gravamen of appellants' tort claim is not these acts but the subsequent failure to compensate,

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[7] The District Court found § 1605(a)(5) inapplicable because the Mexican conduct complained of fell within the "discretionary act" exception to the tort exception. 28 U.S.C. § 1605(a)(5)(A) ("[the tort exception] shall not apply to—(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused"). We also do not reach that issue.

an omission which must be deemed to occur in Mexico. Even if the allegedly wrongful failure to compensate had the effect of retroactively rendering the prior acts on United States soil tortious, at the very least the entire tort would not have occurred here, *see In re Sedco, Inc.*, 543 F. Supp. 561, 567 (S.D. Tex. 1982) ("the tort, in whole, must occur in the United States"), and indeed we think its essential locus would remain Mexico. The primary purpose of the "tortious act or omission" exception of § 1605(a)(5) was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business. House Report, *supra*, at 20-21, 1976 U.S. CODE CONG. & AD. NEWS 6619-20. We decline to convert this into a broad exception for all alleged torts that bear some relationship to the United States.

Affirmed

EDWARDS, *Circuit Judge, concurring*: I concur in Judge Scalia's opinion for the panel, with one caveat. I want to make it clear that I read the holding of the opinion as limited by and responsive to the precise—and highly unique—case before us. In particular, I do not read the opinion to hold that, in a contemporary setting, the United States can *unlawfully* expropriate property legitimately owned by aliens in this country, consummate a treaty with a foreign sovereign extinguishing the aliens' property rights without compensation or consideration, and then totally avoid responsibility under our Constitution or other applicable laws of this Nation. We have no occasion to consider such a situation here and we express no view on its legality.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

September Term, 1983

Civil Action No. 81-02299

No. 83-1596

ASOCIACION DE RECLAMANTES, *et al.*,
Appellants

v.

THE UNITED MEXICAN STATES

[Filed June 5, 1984]

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT

GEORGE A. FISHER
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2299

ASOCIACION DE RECLAMANTES, *et al.*,
Plaintiffs,

v.

THE UNITED MEXICAN STATES,
Defendant.

[Filed April 20, 1983]

MEMORANDUM OPINION AND ORDER

I. *Introduction*

This case is before the Court on a motion to dismiss. It involves a class action brought by the Asociacion de Reclamantes and six individual plaintiffs seeking compensation from the United Mexican States ("Mexico") for its alleged taking and conversion of certain land grant related claims possessed by plaintiffs or their ancestors.

Mexico asserts that the Court lacks subject matter jurisdiction to hear this case as well as personal jurisdiction over Mexico, and that even if the Court assumes jurisdiction, the act of state doctrine precludes it from exercising its jurisdiction and resolving the controversy between the parties.

Counsel filed excellent briefs in this case and their arguments before the Court on January 16, 1983 were ex-

ceedingly helpful in weighing the multitude of contested and competing issues. As the Court noted at the hearing in this case, the alleged injuries to plaintiffs are not only serious and entitled to careful review, but give the Court great concern. Mindful of those considerations, and in accordance with the opinion which follows, the Court holds that it is without subject matter jurisdiction and that the case must be dismissed.

II. *Facts*

In evaluating a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the Court must accept as true all material facts alleged in the complaint. *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981) (on rehearing; *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891-92 (3d Cir. 1977); *Airline Pilots Ass'n Int'l v. Northwest Airlines, Inc.*, 444 F. Supp. 1138, 1142 (D.D.C. 1978). Only where the defendant raises a factual challenge to the jurisdictional facts in the complaint need the court look beyond plaintiff's allegations. *Id.* Here, the defendant has not challenged plaintiff's jurisdictional facts, but rather asserts that on their face, they fail to invoke the power of this Court.

Likewise, in evaluating defendant's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the Court must also accept as true all material facts alleged in the complaint. *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d at 891.

Plaintiffs' claims stem, in part, from the upheaval caused by the Mexican-American War. At the cessation of hostilities, sovereignty over Texas was transferred from Mexico to the United States under the Treaty of Guadalupe Hidalgo, 9 Stat. 922, T.S. No. 207 (Feb. 2,

1848). In the years which followed, plaintiffs' ancestors, who owned land in Texas,[1] were allegedly driven off their land or wrongfully divested of title by the United States, Texas, or the citizens thereof. These actions occurred in spite of provisions in the 1848 Treaty providing that the former Mexican landowners' land grants were entitled to the protection and respect of the United States. Art. VIII, Treaty of Guadalupe Hidalgo, *supra.*

No allegation is made that plaintiffs' ancestors sought the return of, or compensation for, their land in a United States forum since 1848. Rather, plaintiffs' ancestors, many of whom returned to Mexico, convinced the Mexican Government to pursue their claims through diplomatic channels in the early 1920s. Under a 1923 General Claims Treaty between the United States and Mexico, 43 Stat. 1730, T.S. No. 678 (Sept. 8, 1923), the nations created a General Claims Commission to resolve all claims by citizens of each nation against the other contracting nation. The Commission was directed to quantify the number and size of the claims, and to the extent the aggregate claims of the citizens of either nation exceeded the other nation's aggregate claims, the difference would be repaid sovereign to sovereign.[2] Each sovereign would then be responsible for providing compensation to its own citizens.[3] By 1940, only a few of the 433 claims submitted by Mexico on behalf of plaintiffs are alleged to have been evaluated.

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[1] The land in question involves 433 land grants from Spain and Mexico to the ancestors of plaintiffs and consists of approximately 12 million acres of land lying principally between the Rio Grande and the Nu[e]ces River in South Texas.

[2] United States citizens also had claims of expropriation or wrongful taking of property against Mexico and its citizens, in large part as a result of the Mexican Revolution.

[3] In 1934 the General Claims Commission was replaced by two special claims appraisers using a revised appraisal process.

Fueled by the expropriation of American oil company properties in Mexico in 1938, the two sovereigns went to the bargaining table again in 1940. These negotiations allegedly included the 433 land grant claims at issue in this case, and resulted in the payment of $40 million by Mexico to the United States, an amount by which it was found the aggregate United States claims exceeded the aggregate Mexican claims. Treaty on Final Settlement of Certain Claims, 56 Stat. 1347, T.S. No. 980 (Nov. 19, 1941). Plaintiffs further allege that the total value received by Mexico (i.e., total claims against Mexico released) was in excess of $193 million, and that:

> Mexico's release of the United States from liability on the 433 land grant related claims, in exchange for valuable consideration, constituted a use and taking by Mexico of those claims for its own public purposes, including the reduction of Mexico's financial liabilities to the United States. As a result, Mexico became obligated to pay just, effective and prompt compensation for the 433 land grant related claims.

Complaint par. 29.

Shortly after the treaty was signed, the then President of Mexico issued a decree acknowledging Mexico's assumption of the obligation for the land grant related claims, which, in part, stated:

> FOREIGN AFFAIRS DEPARTMENT, DECREE BY WHICH IT IS ORDERED THAT A LAW BE ENACTED FOR THE SETTLEMENT, VALUATION, AND PAYMENT OF THE CLAIMS PENDING BETWEEN MEXICO AND THE UNITED STATES OF AMERICA.
>
> Whereas the Convention regarding claims, signed on the 19th of November of the current year, by the Governments of Mexico and the United States of America, annuls all of the Mexican Claims filed before the General Claims Commission. . . .

Whereas it is the duty of the Government to tend to said claims of our nationals in order to satisfy them in accordance with the role played in the recently executed convention with our neighbor country to the north and in accordance with rules of equity . . . .

Whereas the claims referred to have lost their international character, and have become internal obligations of our government . . . .

Whereas it is necessary to have a law enacted by the honorable Congress of the Union indicating the appropriate procedure for evaluating the claims referred to in this Decree, to judge them and to ascribe to them the compensation to which they are entitled, honoring the findings dictated by the international jurisdictions that have decided some of them . . . .

Decree

I. The Secretariat of Finance shall immediately proceed to study and prepare a plan, which shall be submitted to the honorable Congress of the Union, involving a law for the settlement, valuation, and payment of the Mexican claims presented to the extinct General Claims Commission, established by virtue of the agreement between Mexico and the United States of America on September 8, 1923 . . . .

129 D.O. Sec. 5 at 1-2 (Dec. 31, 1941) (original and translation submitted as Plaintiffs' Exh. E). Thereafter, the Secretariat of Public Finance and Credit acting through the Department of Public Debt of the Administration of Credit sent several letters to plaintiffs assuring them a law would be enacted and compensation paid. Plaintiffs' Exhibits F, G & H. In addition, plaintiffs repeatedly met with Mexican officials to discuss payment of compensation and allegedly were assured that payment was forthcoming.

On September 18, 1981, plaintiffs filed their initial class action in this case, and pursuant to an order of this Court filed a First Amended Complaint on December 18, 1981. On June 17, 1982, discovery was stayed pending a ruling on Mexico's motion to dismiss filed on February 2, 1982. As of this point in time, the plaintiffs assert that no legislation providing for compensation has been enacted in Mexico and Mexico appears to agree. Mexico attached a declaration of its Attorney General stating that: (1) he is authorized to issue official declarations in the name of the Mexican government; (2) he has examined the Complaint in this case; and (3) "that all acts and failures to act by officials or employees of the United Mexican States . . . are a part of the official functions and would be official acts of the Mexican State carried out on its behalf and in the exercise of its sovereign immunity." Official Declaration of the Attorney General, Republic of Mexico (Jan. 29, 1982) (original and translation attached as Exhibit A to Defendant's Memorandum in Support of its motion to dismiss).

III. *Discussion*

Mexico asserts three principal grounds in support of its motion to dismiss: (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; and (3) failure to state a claim.[4] The question of personal jurisdiction is subsumed, however, by the first ground under the Foreign Sovereign Immunities Act ("FSIA").[5]

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[4] Mexico also raises the statute of limitations as a defense, however, the Court does not reach that issue due to the lack of subject matter jurisdiction over the defendant.

[5] 28 U.S.C. Sec. 1330(b) provides that:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under section 1608 of this title . . .

A joint motion and stipulation agreeing that service was proper was filed on December 4, 1981 and accepted by the Court on

A. *Subject Matter Jurisdiction*

Plaintiffs allege subject matter jurisdiction under 28 U.S.C. Sec. 1330(a) and 28 U.S.C. Sec. 1331. Defendant responds that 28 U.S.C. 1330(a) is the exclusive statutory grant of jurisdiction, and that pursuant to its provisions, Mexico is immune as a sovereign from the power of this Court. The Court finds that the question of jurisdiction under 28 U.S.C. Sec. 1331 is a non-issue. For if Mexico is immune under the FSIA, it is, as plaintiff concedes, "of no consequence whether Sec. 1331 jurisdiction exists as well." [6]

The existence of subject matter jurisdiction turns on whether Mexico's acts or omissions fall within the general rule of immunity, 28 U.S.C. Sec. 1604, or are excepted from jurisdiction immunity under 28 U.S.C. Sec. 1605(a)(4) or (5). The plain language of the FSIA provides:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be im-

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December 15, 1981. Therefore, all that remains to be decided is whether there is (a) subject matter jurisdiction, *id.*, and (b) a justiciable claim under the FSIA. 28 U.S.C. Sec. 1330(c). *See* In the Matter of the Arbitration Between Maritime International Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099-1100 (D.C. Cir. 1982).

[6] Plaintiff's Memorandum in Opposition to the Motion to Dismiss the Complaint, at 4 n.5 (April 5, 1982). The Court notes that the greater weight of authority suggests that Sec. 1330 is the exclusive means for exercising jurisdiction over a foreign sovereign. It was enacted as part of the FSIA "to provide when and how parties can maintain a lawsuit against a foreign state . . ." and to ensure parties have a federal forum without needing to invoke diversity jurisdiction. H. Rep. No. 94-1487, 94th Cong., 2d Sess. 61, 13 (1976). *See* Maritime Int'l Nominees v. Republic of Guinea, *supra*, 693 F.2d at 1099; Ruggiero v. Compania Puruana de Vapores, S.A., 639 F.2d 872, 875 (2d Cir. 1981).

> mune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. Sec. 1604. Plaintiffs do not rely on an "existing international agreement" but solely on the above cited exceptions in Sec. 1605. In evaluating plaintiffs' assertions, the Court must respect the Congressional directive that claims of sovereign immunity "henceforth be decided by courts" in accordance with the FSIA, and not by deference to political and diplomatic channels. 28 U.S. Sec. 1602.[7]

The House Report explains:

> . . . the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

H. Rep. No. 94-1487, *supra*, at 7. The parties' dispute involves, and jurisdiction turns on whether Mexico's expropriation of, and continuing failure to pay, plaintiffs' claims are *jure imperii* or *jure gestionis*.

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[7] The Congress became dissatisfied with the State Department practice of making formal suggestions of sovereign immunity in suits against foreign sovereigns. They often resulted in inconsistent decisions due to unequal abilities on the part of foreign sovereigns to bring diplomatic influences to bear on the State Department—influences which could deny litigants due process and may not have been relevant to the decision. H. Rep. No. 94-1487, *supra*, at 7.

At first blush, it appears that Mexico's acts or omissions are public acts. Mexico officially traded plaintiffs' claims in international negotiations with the United States and by treaty and executive decree, assumed and acknowledged its responsibility to plaintiffs to compensate them for their claims. As recently as January 29, 1982, the Attorney General of Mexico acknowledged the claims. The claims, however, could not be for title, but for compensation for the wrongful taking of title in the 19th Century.[8] When the claims were before the General Claims Commission, the United States was in a position to consider offering land as compensation, but such a result was neither likely nor obligatory; particularly where the 1923 treaty recognized that the claims of each nation's citizens, resulting from a variety of unrelated circumstances, were to be set off against one another and resolved on the diplomatic level—allowing each nation to deal with its citizens directly.

The Court finds that plaintiffs' claims, at least since 1923, while they may have their genesis in a wrongful taking of property, were no more than just that: claims. The Court further finds, as both parties concede, that by virtue of the 1923 and 1941 treaties, the claims became internal obligations of Mexico. While Mexico's decision to assume responsibility for plaintiffs' claims may amount to an expropriation, it is by no means clear that the plaintiffs had any rights whatsoever against the United States once their remedies to quiet title expired. Before Mexico can provide a remedy, it must first evaluate and raise money to cover the claims. This is by no means a ministerial task, and requires, at a minimum, public action by the Mexican Government.

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[8] There is no allegation by plaintiffs that they or their ancestors sought to retain or quiet title within the applicable statute of limitations after the alleged wrongful takings occurred. Moreover, Mexico has no power over title to land within the United States under the 1941 treaty.

Plaintiffs respond, however, that the FSIA recognizes that satisfaction of every claim, whether it be commercial or tort, requires a public act, and that 28 U.S.C. Sec. 1605 was enacted to codify the "restrictive" principle of sovereign immunity and guide the courts in applying the doctrine.[9] Accordingly, the Court finds it necessary to evaluate plaintiffs' assertion of exceptions (4) and (5) of Section 1605.[10]

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[9] *Compare* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) (sovereign held immune prior to enactment of FSIA in connection with a commercial loan obtained for general governmental purpose), *cert. denied*, 381 U.S. 934 (1965).

[10] The Court notes that there is a question whether Mexico's "internal obligation" can fall within any of the exceptions to section 1605.

In a section-by-section analysis prepared by the Departments of State and Justice in 1973, the view was expressed that:

> Public debts do not fall within the scope of 1605. The immunity of foreign states in this respect should be maintained by the United States, in its role as one of the principal capital markets of the world . . . .

Immunities of Foreign States: Hearings on H.R. 3493, Before the Subcomm. on Claims and Government Relations of the H. Comm. on the Judiciary, 93d Cong., 1st Sess. 42 (1973) (hereinafter "1973 Hearings"). The Court is mindful of Congress' instructions not to consult the 1973 section by section analysis in construing the FSIA and that no inferences should be drawn by differences between the 1973 analysis and the FSIA. H. Rep. No. 94-1487, *supra*, at 12. For this reason, the Court is not relying on any "differences," but instead notes the following contemporaneous constructions of the bill.

When the FSIA was first proposed it contained proposed Section 1606 which provided that all debts of sovereigns would remain beyond the jurisdiction of the U.S. courts. *See* H.R. 11315, 93d Cong., 1st Sess. (1973); H.R. 11315, 94th Cong., 1st Sess. (1975); 1973 Hearings, *supra*, at 42. Ultimately, the provision was deleted from H.R. 11315. The Committee found it unnecessary because U.S. lenders "invariably include an express waiver of immunity in the debt instrument." H. Rep. No. 94-1487, *supra*, at 10; S. Rep. No. 1310, 94th Cong., 2d Sess. 7 (1976). Proposed section 1606

1. *The Immovable Property Exception—Sec. 1605 (a)(4)*

Under 28 U.S.C. Sec. 1605(a):

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case—(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue. . . .

Notably, this exception to the general rule of sovereign immunity contains two independent triggering clauses. The first clause speaks of "rights in property in the United States acquired by succession or gift" and the second speaks of "rights in immovable property situated

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was ambiguous in that it applied to all debts, not just general governmental obligations. The State Department considered amending it but then decided that no provision was better than a more precise provision which identified only non-commercial debts for general government obligations as eligible for *per se* sovereign immunity. Jurisdiction of the U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Government Relations of the H. Comm. on the Judiciary, 94th Cong., 2d Sess. 69, 75 (1976).

The 1976 House Report specifically discusses the deletion of proposed section 1606 to which the above quoted passage referred. The Committee appears to have ignored the fact that a public debt could exist in other than the commercial lending context. It merely suggests that only public debts "which are of a commercial nature and should be treated like other commercial transactions" are excepted from sovereign immunity. *Id.* The non-commercial debt obligation is thus arguably immune by implication and may place the "internal obligations" in dispute in this case outside the scope of the Section 1605 exceptions.

This is in accordance with the historical meaning of a "public debt," which was considered a *per se* public act and a sufficient basis for sovereign immunity. *See, e.g.*, Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dept. of State, to the Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711-15 (1976).

in the United States." Plaintiffs' make a formalistic argument that the first phrase was drafted to deal with all kinds of property (real, personal or intangible) acquired by succession or gift and that the second phrase was drafted to deal with suits involving rights in immovable property. Plaintiffs assert that both clauses apply to its claims against Mexico. They argue alternatively that their claims arise from rights in "immovable property," as well as concern inherited intangible property (i.e., claims) located in the United States. The Court disagrees.

Since the beginnings of positive law, attorneys have argued over the plain meaning of statutes. *See* Graff, *"Keep Off the Grass," "Drop Dead," and Other Indeterminacies: A Response to Sanford Levinson*, 60 Tex. L. Rev. 405 (1982). Plaintiffs first seek to establish that their claims are a "usufructuary" interest[11] and thus a right in "immovable property." The difficulty with this assertion is it assumes plaintiffs had a colorable legal right to title in 1923 when Mexico and the United States agreed to consider their claims at the diplomatic level. When sovereigns sit down at the bargaining table, as Mexico and the United States did in 1923, 1934 and 1941, a multitude of considerations may effect a decision to recognize a claim, considerations which may not be cognizable at law. Plaintiffs have not alleged that they had title to the land in 1923 or that they attempted to regain title in a legal forum prior to that time. All they have alleged is the United States' acknowledgment, at the diplomatic level, of plaintiffs' rights to prove their claims, and that Mexico assumed the United States' obligation to satisfy the claims. As a result, it requires a stretch of the Court's imagination to hold that the underlying controversy in this suit involves an action to quiet title or to recover money derivative of real property rights. *See*

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[11] *See* La. Civ. Code Ann. Arts. 462-470, 575 (West 1980); Mexican Civ. Code Arts. 750, 980 (Ediciones Andrade 1976).

Bachman v. Lawson, 109 U.S. 659 (1884); *Comegys, et al. v. Vasse*, 26 U.S. (1 Pet.) 193 (1828). Rather, the Court holds that plaintiffs' claims, however meritorious they appear on the scales of justice, involve intangible property rights created through the diplomatic process. Cf. Matter of Rio Grande Transport, 516 F. Supp. 1155, 1160 (S.D.N.Y. 1981) (a liability compensation fund is not real estate and thus not immovable property).

Plaintiffs alternatively argue that their claims fall within the meaning of inherited property under section 1605(a)(4). This assertion must also fail. If the Court were to adopt plaintiffs expansive reading of the FSIA, any claim or chose in action involving inherited property (real, personal or intangible) would be excepted from the rule of sovereign immunity. Because every dispute with a foreign sovereign necessarily involves these kinds of intangible rights, every dispute in plaintiffs' view would be excepted from sovereign immunity when it passes by gift or succession. This is contrary to the purpose of the FSIA.

The FSIA codified the existing "restrictive" principles of sovereign immunity in section 1605. H. Rep. No. 94-1487, *supra*, at 7. Congress included the succession clause ("rights in property in the United States acquired by succession or gift") to ensure that real, personal and intangible property rights were justiciable where a foreign sovereign steps into the shoes of a private litigant by obtaining rights in property through a gift or inheritance. H. Rep. No. 94-1487, *supra*, at 20. *See generally* Restatement (Second) of the Foreign Relations Law of the United States (Revised) sec. 455 (Tent. Draft No. 2, 1981). It did not intend to open the courts to all suits involving inherited or donated property.

2. *The Tort Exception—28 U.S.C. Sec. 1605(a)(5)*

Plaintiffs next rely on the tort exception to invoke the jurisdiction of the Court. They reason that Mexico as-

sumed a duty to compensate plaintiffs in the United States when it signed the 1941 treaty, and that the continuing failure to provide such compensation amounts to a conversion of plaintiffs' claims.

Section 1605(a)(5) provides for limited jurisdiction over tort claims:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
>
> > (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . .

28 U.S.C. sec. 1605(a)(5). As noted above, plaintiffs do not assert, nor is it clear that they possessed, legal claims against the United States. They argue instead that whatever the status of their claims against the United States, Mexico acknowledged their validity, assumed responsibility, and converted their rights.

The settlement of claims between sovereigns, in which each sovereign agrees to compensate its own citizens, does not create a private right of action in U.S. courts for a taking or conversion resulting from the failure of the United States to provide the agreed upon compensation. *Aris Gloves, Inc. v. United States*, 420 F.2d 1386 (Ct. Cl. 1970). *See* Restatement (Second) of the Foreign Relations Law of the United States (Revised) sec. 721 n.8 (Tent. Draft No. 3, 1982); L. Henkin, *Foreign Affairs and the Constitution* 262-63 (1972). The rationale for

this rule applies with greater force in this case where the Court is asked to intervene in a foreign sovereign's relations with plaintiffs under a treaty. Not only does it require a review of the actions of the Mexican Government, but it requires an implicit reversal of the decision by the Executive Branch and Congress to entrust the compensation of plaintiffs to Mexico in 1941. The Court is doubtful whether it has any authority, absent extraordinary and compelling circumstances, to exercise jurisdiction over the foreign affairs of the United States.[12]

Even assuming this case warrants judicial intervention and that Mexico's continuing failure to compensate plaintiffs constitutes a taking or conversion of plaintiffs' claims, plaintiffs still concede that the "highest authorities" of the Mexican Government including the President and the Legislature have failed to act. The evaluation, financing, and payment of plaintiffs' claims are not ministerial matters. *See In re Complaint of Sedco, Inc.*, 543 F.2d 561 (S.D. Tex. 1982). *Cf. Dalehite v. United States*, 346 U.S. 15, 35-36 (1953). The judgments are not merely operational, but raise substantial and serious questions of fiscal policy, and the allocation of limited resources.[13] Moreover, Professor Henkin persuasively writes, with respect to the settlement of claims by the United States, that:

> No one has successfully argued in the Supreme Court that in purporting to dispose of private claims, in the details of a particular settlement, in the procedures established for making awards to private

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[12] *See* discussion, *infra*, at pages 22-27.

[13] A few of the claims were processed by the General Claims Commission before 1941, and Mexico agreed to honor those decisions. *See* Presidential Decree, 129 D.O. sec. 5, *supra* at pages 5-6. Those findings, however, only went to the validity of the claims and their valuation. Even if honoring those findings is ministerial, funding them is certainly not.

> claimants, in Congressional legislation providing (or failing to provide) for award and payment, the United States deprived the original claimants of property without due process of law, impaired the obligation of their contracts or appropriated their claims for a public purpose and was obligated to pay them just compensation for any loss. The Court has refused to scrutinize any settlement and has affirmed that Congress has discretion to decide whether and how and to what extent to compensate the original creditors.

L. Henkin, *Foreign Affairs and the Constitution*, 263 (1972) (footnotes omitted). These considerations are high-level policy judgments, requiring deference to the expertise and discretion of the United States Congress and the Executive Branch. This Court finds it should defer under 28 U.S.C. sec. 1605(a)(5) to the expertise of the Mexican Government, regardless of whether that judgment, in the Court's or plaintiffs' views, is an abuse of discretion.

The Court is sympathetic to the plaintiffs' dilemma. The alleged delays on Mexico's part offend its sense of fair play and justice, but it must also respect its jurisdictional boundaries. Because, however, jurisdiction under the tort exception is barred with respect to all matters "based upon the exercise or performance or the failure to perform a discretionary function," the Court holds the alleged conversion of or failure to honor plaintiffs' claims extend beyond the parameters of federal subject matter jurisdiction.[14]

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[14] An additional basis for declining jurisdiction, on which the Court does not rely, is that assuming Mexico converted plaintiffs' claims and committed a tort, the tort occurred in Mexico and did not affect property in the United States. *See* Perez v. The Bahamas, 652 F.2d 186, 189 (D.C. Cir.), *cert. denied*, 102 S. Ct. 326 (1981). As noted above, the alleged tort involves the conversion of claims against Mexico, not property in the United States.

B. *The Act of State Doctrine*

In reaching its decision, the Court is guided by the act of state doctrine.[15] Sovereign immunity and the act of state doctrine are generally independent concerns, and the former is binding while the latter is subject to discretionary application. *See Int'l Ass'n of Machinists & Aerospace Workers v. Org. of Petroleum Exporting Countries*, 649 F.2d 1354, 1359 (9th Cir.), *cert. denied*, 454 S. Ct. 1163 (1982) (hereinafter "*OPEC*"). The Court in *OPEC* explained:

> The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states. The two doctrines differ, however, in significant respects. The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional. *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 . . . (1918). Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from the peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government . . . The act of state doctrine is apposite whenever the federal courts must question the legality of the sovereign acts of foreign states.

649 F.2d at 1359.[16]

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[15] *Cf.* Fountain v. Metro. Atlanta Rapid Transit Authority, 678 F.2d 1038, 1041 (11th Cir. 1982) ("federal courts should be scrupulous in confining their use of judicial power to the precise limits set by the Constitution and Congress.").

[16] The court went on to hold that the FSIA could not and does not supersede the act of state doctrine. *Id.* at 1359-60.

Many, if not all, of the issues raised under the FSIA involve the acts or omissions of the Mexican Government, and even assuming the FSIA did not preclude jurisdiction, consideration of those issues are at best on the fringe of judicial authority.

The Supreme Court ruled in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) that:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

See also Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. 1280 (D. Del. 1976), *aff'd*, 564 F.2d 89 (3d Cir. 1977). Plaintiffs contend that the doctrine does not apply to this case because Mexico has failed to prove an act of state affecting property or persons over which Mexico is the sovereign. Plaintiffs must concede and in fact they allege that the Mexican Government has failed to act. They rely, however, on three alleged facts: (1) Mexico has not yet proven an act of state sufficient to warrant application of the doctrine at this stage of the litigation; (2) plaintiffs' claims are located in the United States and are not subject to the sovereignty of Mexico; and (3) the act of state doctrine is discretionary and is unnecessary in the case because the validity of Mexico's acts are not in issue.

In *Alfred Dunhill, supra*, the Court held that Cuba could not rely on the assertions of counsel that the failure to pay a debt was an act of state. 425 U.S. at 694-95. In this case, however, plaintiffs base their claim on Mexico's failure to act, which the Court assumes to be true

for the purpose of this motion.[17] No further proof is required unless plaintiffs contend that the failure to act is not an act of state; an assertion which has little, if any, merit. *D'Angelo v. Petroleos Mexicanos*, 422 F. Supp. at 1290 ("Non-action as well as affirmative conduct of a governmental agency, if based upon sovereign governmental authority, can have the status of an act of state . . . .").

Plaintiffs' reliance on the situs of their claims is likewise misplaced. As discussed above, and as plaintiffs concede, their claims were assumed by Mexico in return for an assumption of American claims by the United States.[18] At no time prior to the transfer did plaintiffs establish a legal right to their claims prior to Mexico's assumption.[19]

For the Court to accept plaintiffs' argument, it would first have to hold that any person who has a claim against a foreign sovereign could transfer situs of the claim to the United States by moving to the United States. Clearly, such a holding distorts the doctrine whose application does not focus as much on the situs of property, but on whether a court in ordering relief would unduly interfere with the foreign affairs authority of the executive branch. *See Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 393 F.2d 706, 715 (5th Cir.) *cert. denied*, 393 U.S. 924 (1968); *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1027 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972). Unlike *Maltina*, Mexico is not seeking extra-territorial enforcement of an act of state (i.e., a corporate dissolution), but respect for its discre-

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[17] The affidavit of Oscar Flores, Attorney General of Mexico, attached to Defendant's motion as Exhibit A, merely confirms the allegations in plaintiffs' Complaint and is unnecessary for the Court to reach its holding.

[18] *See* discussion, *supra*, at pages 4-5.

[19] *Id.*

tion to handle plaintiffs' claims. *Id.* at 1025-26.[20] Nor is Mexico or any other party seeking to impose the effect of Mexico's acts on property located in the United States.

Finally, plaintiffs ask the Court to use its discretion and not apply the doctrine. As noted above, however, the issues before the Court, both in determining jurisdiction and, if it had been necessary, in affording ultimate relief, would require the Court to exercise its power in zones of influence delegated by the Constitution to the executive and legislative branches.

"There is a long history of [executive] governmental action compensating our own citizens out of foreign assets in this country for wrongs done them by foreign governments abroad." *Sardino v. Federal Reserve Bank of New York*, 361 F.2d 106, 112 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). Frequently, they are the result of claims settlement negotiations on the sovereign to sovereign level. *See e.g., United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Great Western Insurance Co. v. United States*, 112 U.S. 193, 199 (1884). Judicial intervention would directly interfere with the historical authority of the executive and legislative branches in negotiating, signing and ratifying treaties. For the Court to rule that Mexico violated international and Mexican law by failing to compensate plaintiffs would seriously damage the lawful and apparent authority of United States negotiators. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Underhill v. Hernandez*, 168 U.S. 250 (1897). Entertainment of plaintiffs' claims could reopen

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[20] In *Maltina*, the former owners of a brewery, expropriated and dissolved by Cuba, were successful in defeating a claim that their corporate dissolution was an act of state and that their corporate authority must be honored in the United States insofar as it involved trademarks located in the United States. *Id.* at 1027.

the Mexican-American claims dispute.[21] Wherefore, the Court alternatively holds that the act of state doctrine bars consideration of plaintiffs' case.

IV. *Conclusion*

The Court is deeply troubled by the allegations in plaintiffs' complaint. Mexico agreed in 1941 to assume responsibility for plaintiffs' loss of land in the Southwestern United States. Neither the United States nor an appropriate legal forum within its borders ever found plaintiffs' claims to be legally cognizable. Mexico received substantial consideration, however, in return for its assumption: a release from liability for various claims of American citizens resulting from the Mexican Revolution. Those latter claims were paid by the United States as part of its recognized treaty obligations.

For reasons unknown to the Court, and beyond its limited grant of jurisdiction under Article III of the Constitution, Mexico has allegedly failed, as the 1941 treaty provides, to promptly evaluate the claims and provide compensation. Despite these serious concerns, the Court holds that it lacks subject matter jurisdiction over this case pursaunt to the FSIA.

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[21] A recent example of this possibility is the negative impact on United States relations with China as a result of Jackson v. Peoples Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982). In *Jackson*, China chose not to appear and defend against a suit for payment on $41.3 million of 1911 Huguang railroad government obligations. The Court entered a default judgment and subsequently the Executive Branch has been requested by Chinese officials to intervene in the decision and deny its effect. Wren, *Separation of Powers? You Must Be Kidding Says China*, N.Y. Times, March 20, 1983, The Week In Review Section. Unlike this case, had the foreign sovereign entered an appearance, the Court might have been presented with a record on which to consider the act of state doctrine.

ORDER

WHEREFORE, it is this 20th day of April, 1983, hereby

ORDERED that defendant's motion to dismiss the complaint be and hereby is granted.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-02299

No. 83-1596

ASSOCIATION DE RECLAMANTES, *et al.*,
Appellants

v.

THE UNITED MEXICAN STATES

Appeal from the United States District Court
for the District of Columbia

Before: EDWARDS and SCALIA, Circuit Judges, and SWYGERT, * Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court ap-

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

pealed from in this cause is hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 5, 1984

Opinion for the Court filed by Circuit Judge Scalia.

Concurring statement filed by Circuit Judge Edwards.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-02299

No. 83-1596

ASOCIACION DE RECLAMANTES, *et al.*,
Appellants

v.

THE UNITED MEXICAN STATES

[Filed July 23, 1984]

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges and SWYGERT *, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

ORDER

The Suggestion for Rehearing *en banc* of Appellants has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court

GEORGE A. FISHER
Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

* Sitting by designation pursuant to title 28 U.S.C. § 294(d).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 81-02299

No. 83-1596

ASOCIACION DE RECLAMANTES, *et al.*,
Appellants

v.

THE UNITED MEXICAN STATES

[Filed Aug. 28, 1984]

Before: EDWARDS and SCALIA, Circuit Judges, and SWYGERT *, Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

ORDER

On consideration of Appellants' Petition for Rehearing and Appellants' Motion for Stay of Mandate, it is

ORDERED by the Court that the Petition for Rehearing is denied and it is

FURTHER ORDERED by the Court that the Motion for Stay of Mandate is denied.

Per Curiam

For the Court

GEORGE A. FISHER
Clerk

By /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2299

ASOCIACION DE RECLAMANTES,
a Texas nonprofit corporation,
721 East Baker
Edinburg, Texas 78539
(512) 383-4691,

AMINTA ZARATE
721 East Baker
Edinburg, Texas 78539
(512) 383-2035,

LUIS RIOJAS
3019½ Glenhurst Avenue
Los Angeles, California 90039
(213) 660-5290,

FELIPA FLORES BENAVIDEZ
Route 4, Box 798
Edinburg, Texas 78539
(512) 383-4786,

MARIA AGUIRRE DE SCHULTZ
7226 Westglade Place
San Antonio, Texas 78227
(512) 674-0292,

NIEVES GUERRERO CHAPA
Isac Garza #1515 Pte.
Monterrey, Nuevo Leon
Mexico
745846

SANTOS ZARATE PRIETO
Jesus Bernal #204
Aguascalientes, Aguascalientes
Mexico
65482

Plaintiffs,

v.

THE UNITED MEXICAN STATES,
Defendant.

FIRST AMENDED CLASS ACTION COMPLAINT FOR TAKING OF PROPERTY

Plaintiffs Asociacion de Reclamantes, Aminta Zarate, Luis Riojas, Felipa Flores Benavidez, Maria Aguirre de Schultz, Nieves Guerrero Chapa and Santos Zarate Prieto, by and through their attorneys, on behalf of themselves and the class alleged herein, state and allege for their complaint against the Defendant United Mexican States ("Mexico") as follows:

I. *PRELIMINARY STATEMENT*

1. This is a class action brought against Mexico by the specifically named Plaintiffs in their own behalf and on behalf of others similarly situated to recover monetary damages from Mexico for its use and taking of claims they or members of their families originally possessed against the United States of America (the "United States") for the loss of nearly 12 million acres of land in the State of Texas held under land grants from Spain or Mexico and to establish a fund out of which class members may be paid. Mexico has failed to pay these private claims, which it valued in 1925 at $193,658,954.60, and which Mexico took and used for its own public purposes, including the securing of recognition by the United States of a new Mexican government and the reduction

of Mexico's international financial obligations to the United States. Since 1941 to the present, Mexico has repeatedly acknowledged its obligation to compensate the Plaintiffs and class members but has failed to satisfy that obligation.

II. *JURISDICTION AND VENUE*

2. The jurisdiction of this Court over each of the claims for relief alleged herein is invoked under 28 U.S.C. §§ 1330(a) and 1331. The jurisdiction of this Court over Defendant Mexico is invoked under 28 U.S.C. § 1330(b).

3. Venue is proper in this district under 28 U.S.C. § 1391(f) which provides that "a civil action against a foreign state . . . may be brought . . . (4) in the United States District Court for the District of Columbia. . . ."

III. *PARTIES*

4. Plaintiff Asociacion de Reclamantes is a Texas non-profit corporation established in 1978. Its membership, totalling nearly 2,000 individuals, is comprised of heirs, descendants and successors (hereinafter "heirs" includes "heirs and successors") of recipients of Spanish and Mexican grants of land in Texas. As hereafter set forth, the members now possess claims against Mexico for its use, taking and failure to pay for the land grant related loss claims they or their ancestors possessed against the United States. The Asociacion was established to assist the heirs in securing compensation for these claims from Mexico.

5. Each of the individual Plaintiffs is an heir of persons on whose behalf Defendant Mexico asserted and settled claims and whom Mexico has failed to compensate. Each of the individual Plaintiffs is also a member of the Asociacion de Reclamantes and of the class sought to be represented herein.

a. Plaintiff Aminta Zarate is a citizen and resident of the United States and of the State of Texas.

b. Plaintiff Luis Riojas is a citizen and resident of the United States and of the State of California.

c. Plaintiff Felipa Flores Benavidez is a citizen and resident of the United States and of the State of Texas.

d. Plaintiff Maria Aguirre de Schultz is a citizen and resident of the United States and of the State of Texas.

e. Plaintiff Nieves Guerrero Chapa is a citizen and resident of Mexico who resides in the Mexican State of Nuevo Leon.

f. Plaintiff Santos Zarate Prieto is a citizen and resident of Mexico who resides in the Mexican State of Aguascalientes.

6. Defendant Mexico is a foreign state within the meaning of 28 U.S.C. § 1603.

IV. *CLASS ACTION ALLEGATIONS*

7. Plaintiffs seek to represent the class of all persons who are the heirs of the original grantees of, or the heirs of persons succeeding to title to, 433 specific grants of land located in what is now the State of Texas, on whose behalf Mexico asserted claims for damages for loss of such lands in negotiations and other proceedings with the United States culminating in the Treaty of November 19, 1941 between the two countries (hereafter "1941 Treaty"). Attached hereto as Exhibit C is a document prepared by Defendant Mexico in 1932 describing the 433 land grant related claims, and identifying the location of the land, the original grantees and the value of each claim. As a result of the acts of Mexico hereinafter described, Plaintiffs and the class they seek to represent are entitled to payment of compensation and damages by Mexico for its use, taking, and failure to pay for claims which the class members and their families possessed against the United States as a result of violations of their rights to land in Texas.

8. This action is properly maintainable as a class action on behalf of the class defined above (hereinafter the "Class") under Rules 23(a), 23(b)(1)(A) and (B), and 23(b)(3) of the Federal Rules of Civil Procedure.

a. The Class is so numerous that joinder of all members is impracticable. Although it cannot now be stated with certainty how many persons are in the Class, approximately 2,000 persons, the majority of whom are members of the Asociacion de Reclamantes, have been identified by documentary evidence as members of the class. Plaintiffs believe that there are substantially more members of the Class than the group already identified, including as many as 20,000 persons.

b. There are numerous questions of law and fact common to the members of the class. They include at least the following:

1) Whether the court has jurisdiction over the claim;

(2) Whether Mexico is obligated to pay compensation to plaintiffs and other class members as a result of its extinguishment of claims they or their ancestors had against the United States stemming from certain losses of land in the state of Texas;

(3) Whether, if the plaintiffs are entitled to damages, the measure thereof is the valuation placed on the claims by Mexico itself, with appropriate interest and adjustments for inflation, or whether another measure of damages is appropriate. Other common questions may arise depending on what defenses Mexico may choose to assert in this action.

c. Plaintiffs' claims are typical of the claims of all members of the Class.

d. Plaintiffs will fairly and adequately represent and protect the interests of the members of the Class.

(1) Each of the individual plaintiffs, together with plaintiff Asociation de Reclamantes, has for many years

actively and diligently sought to obtain redress from Mexico for their claims and those of others similarly situated, through means short of litigation.

(2) Plaintiffs, together with other members of the Asociacion, have been and are committed to carrying the expenses, pending litigation, of pursuing the claims of all class members for the compensation to which they are entitled;

(3) Plaintiffs have retained as counsel attorneys in Colorado and California with experience over a five-year period in attempting to vindicate their rights through negotiations with the Mexican Government, and who are highly familiar with the legal basis for the claims, as well as local counsel with experience in federal court litigation.

(4) Plaintiffs are also representative of the general characteristics of the Class members. Plaintiffs Zarate, Riojas, Flores Benavidez, Aguirre de Schultz are all United States citizens resident in Texas or California, where plaintiffs believe a majority of potential class members reside. Plaintiffs Guerrero Chapa and Zarate Prieto are citizens and residents of Mexico, where other Class members reside.

(5) Plaintiffs' claims, as set forth in paragraphs 65-106 of this Complaint, are typical of those of the Class. Some representative plaintiffs, for example, claim only through familial descent, while others claim in part through successorship. All of the representative plaintiffs have gathered the necessary documentation to establish the validity of their claim under the rights of their ancestors or predecessors for compensation from the defendant.

e. Insofar as there are numerous heirs, some known and others not, who may be entitled to share in any recovery, prosecution of separate actions by individual Class members would create a risk of 1) inconsistent ad-

judications which would establish incompatible standards of conduct for Defendant Mexico and 2) adjudications with respect to individual Class members which would as a practical matter be dispositive of the interests of the other members or substantially impair or impede their ability to protect their interests.

f. The common questions of law and fact predominate over any questions affecting only individual Class members, including the question of individual damages, and a class action is superior to other methods for a fair and efficient adjudication of the controversy because, *inter alia*, the number of the members of the Class is substantial and the members' interests are highly similar.

(1) Given the number of different possible claimants with regard to each of the original land grants, the interests of class members in individually controlling the prosecution of actions separately is small;

(2) There are no other pending cases concerning the controversy of which any of the plaintiffs or their counsel are aware;

(3) It is highly desirable to litigate all such claims against Mexico in one forum, since all parties have an interest in a final resolution of the liability issue; and

(4) No difficulties of managing this action as a class action are posed that cannot be resolved at an appropriate time through the establishment of sub-classes pursuant to Rule 23(c)(4).

V. *GENERAL ALLEGATIONS*

Acquisition And Loss Of Land In Texas.

9. During the period prior to February 2, 1848, Spain and Mexico, which exercised sovereignty over the region now known as the State of Texas (hereafter "Texas"), made thousands of grants of land in Texas, including the 433 grants to Plaintiffs' ancestors. Collectively these 433

land grants encompassed 12 million acres of land, most of it laying between the Rio Grande and the Nueces River in South Texas.

10. Under the Treaty of Guadalupe Hidalgo, entered into by Mexico and the United States on February 2, 1948, Mexico relinquished to the United States its claim to sovereignty over Texas and other vast areas now part of the United States. Since 1848 sovereignty over Texas has been exercised by the State of Texas and the United States.

11. Under the Treaty of Guadalupe Hidalgo, principles of international law and the law of the United States, the rights possessed under Spanish and Mexican grants of land in Texas by the recipients of such grants and their heirs were entitled to be respected and protected by the United States and its citizens.

12. After the United States and State of Texas assumed sovereignty over Texas, the rights of the original Spanish and Mexican grantees and their heirs to land in Texas were not respected but were wrongfully taken and violated by the United States, the State of Texas and their citizens, resulting in the loss by the original land grantees and their heirs of 12 million acres of land in Texas.

13. Under the Treaty of Guadalupe Hidalgo and principles of international law, Mexico sought redress from the United States for the heirs of the original Spanish and Mexican grantees for the violations of their land grant based rights.

Mexico's Solicitation, Assertion And Filing Of Heirs' Claims Against The United States For Land Losses.

14. In the early 1920s General Alvaro Obregon, victor in the Mexican Revolution and President of Mexico, sought recognition from the United States of his government as the *de jure* government of Mexico.

15. The United States initially sought to condition any such recognition on Mexico's satisfaction of several hundred million dollars of claims by American nationals against Mexico. These claims stemmed from alleged acts or omissions of the Mexican Government during the Mexican Revolution as well as prior to and after it.

16. President Obregon responded by raising the issue of the United States' liability to the heirs of the original Spanish and Mexican grantees for violations of their families' land grant rights in Texas. Mexico asserted that these violations had given rise to a substantial monetary liability.

17. By these negotiations, President Obregon achieved a substantial Mexican public purpose: the securing of the United States' official recognition of his government as the *de jure* government of Mexico without first satisfying the claims of American nationals.

18. On September 8, 1923, Mexico, and the United States entered into a treaty (the "1923 Treaty") to provide in part "for the amicable settlement and adjustment of claims" which had been raised in the recognition discussions. Attached hereto as Exhibit A is a copy of the 1923 Treaty. Pursuant to the 1923 Treaty, the United States and Mexico agreed to the establishment of a General Claims Commission which would have the authority to hear and decide a variety of claims, including those of the heirs of original Spanish and Mexican land grantees against the United States which Mexico had previously raised in the recognition discussions.

19. Mexico filed 836 claims against the United States with the General Claims Commission which it valued at $245,158,395.32 plus interest. Of these claims, 433 were on behalf of the heirs, including many American citizens, of original Spanish and Mexican grantees of land in Texas. Mexico valued these 433 claims in 1925 at $193,658,954.60 plus interest, a figure determined by ref-

erence to the value of the lands taken. Attached hereto as Exhibit B is a copy of one of the 433 complaints Mexico filed against the United States on behalf of the heirs. Also attached hereto, as Exhibit C, is a copy of a document published by Mexico in 1932 which lists and describes with particularity each of the 433 land grant related claims it filed against the United States and specifies the grantee and the dollar value of each claim.

20. The United States filed 2,781 claims against Mexico with the General Claims Commission with a total asserted value of $513,694,267.17.

21. In order to obtain, develop and present the 433 land grant related claims it filed with the General Claims Commission, Mexico engaged in numerous activities between approximately 1920 and 1941 in the State of Texas and the United States.

22. On information and belief, Plaintiffs allege that the activities of Mexico in this period in the United States and State of Texas included:

a. placing notices in public places, newspapers, magazines and periodicals and on the radio advising the heirs that it would file claims on their behalf against the United States based on their families' land losses;

b. meeting with the heirs at the Mexican Consulate in San Antonio, Texas, and at various other locations to discuss their claims;

c. securing evidence from the heirs and from other sources necessary to prove the land granted related claims;

d. retaining the services of attorneys, investigators and others to, among other things, meet with the heirs to develop their claims;

e. negotiating on behalf of the heirs with the United States at Washington, D.C. and other locations;

f. filing claims on behalf of the heirs with the General Claims Commission in Washington, D.C.; and

g. entering into treaties and protocols with the United States regarding the heirs' claims.

23. When the General Claims Commission ceased hearing and deciding claims in 1931, it had heard and decided none of the 433 land grant related claims Mexico had filed and only 109 of the other several thousand claims before it.

24. Pursuant to the protocol of April 24, 1934, between Mexico and the United States, the claims not decided by the General Claims Commission were to be evaluated by two appraisers acting under a specified appraisal procedure.

25. When the authority of the appraisers to act on the claims expired on or about June 30, 1936, none of the 433 land grant related claims filed by Mexico, and only a few of the remaining claims, had been evaluated pursuant to this procedure.

Mexico's Confiscation and Use Of The Heirs' Land Loss Claims.

26. In early 1940 Mexico and the United States commenced negotiations aimed at resolving a host of pending disputes between them. Among such disputes were the 433 land grant related claims Mexico had filed with the General Claims Commission as well as new claims by American oil companies seeking compensation for oil producing properties expropriated by Mexico in March, 1938.

27. In these negotiations, the United States and Mexico agreed to settle and resolve the claims that each had against the other, including the 433 land grant claims at issue herein, by setting off and releasing each set of asserted claims. This agreement was embodied in the

1941 Treaty, by which Mexico became obligated to pay $40,000,000 to the United States, the amount by which all of the United States claims against Mexico were determined to exceed all of the Mexican claims against the United States. By the 1941 Treaty, Mexico received substantial value, in excess of $193 million, in satisfaction of the claims involved in the instant action which Mexico had asserted against the United States. The Treaty of 1941 is attached hereto as Exhibit D.

28. Mexico paid the $40,000,000.00 to the United States in a timely manner and by approximately 1948 the United States had paid the claims of American nationals against Mexico, which the United States had asserted in the Treaty negotiation, pursuant to the provisions of the Settlement of Mexican Claims Act of 1942, public law 814, 77th Cong., 2d Sess., 56 Stat. 1058.

29. Mexico's release of the United States from liability on the 433 land grant related claims, in exchange for valuable consideration, constituted a use and taking by Mexico of those claims for its own public purposes, including the reduction of Mexico's financial liabilities to the United States. As a result, Mexico became obligated to pay just, effective and prompt compensation for the 433 land grant related claims.

Mexico's Acknowledgment Of Its Obligation To Compensate Heirs For Their Claims.

30. On December 9, 1941, the then President of Mexico, Manuel Avila Camacho, issued a decree which acknowledged Mexico's obligation to pay compensation for the expropriated land grant related claims. The Decree stated:

> "[I]t is the duty of the Government to satisfy [the claims] in accordance with the role they played in the [1941 Treaty]. . . . [T]he claims . . . have become internal obligations of our government . . . one of our many domestic pecuniary responsibilities."

A copy of this decree, with an English translation, is attached hereto as Exhibit E.

31. From 1941 to the present Mexico has repeatedly acknowledged its obligation and intention to pay compensation for the confiscated land grant related claims. Such acknowledgements have been made in numerous letters to heirs of the original grantees under whom the land grant related claims were made. A copy of such a letter sent to Plaintiff Aguirre de Schultz's ancestors, with an English translation, is attached hereto as Exhibit F. Similar letters were sent to members of the class as recently as the late 1970's.

32. These letters, including Exhibit F, specifically stated:

> The Federal Government intends to resolve this grave problem, as soon as the economic conditions of the treasury permit it to.

33. On information and belief, Plaintiffs alleged that annually from the celebration of the 1941 Treaty to the present Mexico, in official reports prepared and disseminated by its Treasury Department, has listed among its monetary debts its obligation to pay compensation for the confiscated land grant related claims.

34. Heirs of the original Spanish and Mexican grantees under whom the land grant related claims arose have made numerous efforts since November 19, 1941, to secure compensation from Mexico for confiscated claims.

Efforts By Heirs To Secure Compensation From Mexico; Meetings With And Representations Of Mexican Officials.

35. In the late 1970s heirs of the original Spanish and Mexican grantees of land in Texas joined together in an effort to secure compensation from Mexico for their confiscated claims.

36. Since 1976 representatives of the heirs have met various times with representatives of Mexico to discuss its liability to the heirs as a result of its use, taking and confiscation of their land grant related claims.

37. In October, 1976, during the term of Mexican President Luis Echeverria Alvarez, the heirs' representatives met with Lic. Jose Gallastigue, an Under-Secretary in the Mexican Foreign Ministry, to discuss payment of the heirs' claims.

38. Lic. Gallastigue stated that the claims of the heirs would be paid if they proved their descent from one of the 433 original Spanish and Mexican land grantees under whom Mexico filed claims with the General Claims Commission.

39. The heirs' representatives reasonably relied upon Lic. Gallastigue's representations and thereupon performed substantial work and incurred expenses to submit documents to Lic. Gallastigue proving the claims of three such heirs.

40. Lic. Gallastigue's tenure as an Under-Secretary ended on or about November 30, 1976, with the inauguration of Lic. Jose Lopez Portillo as Mexico's new President. The heirs' representatives never received a response from Lic. Gallastigue on the claims they submitted to him.

41. In September, 1977, the heirs' representatives met with Ambassador Eduardo Gutierrez Evia, head of the Legal Advisor's Office of the Mexican Foreign Ministry, and members of his staff to discuss payment of compensation on the heirs' claims.

42. In this meeting, the heirs' representatives were told that a review would be made of Mexico's obligation to pay compensation on the claims and that Mexico would pay such claims if the Legal Advisor's Office determined that there was a present obligation to do so.

43. The heirs and their representatives reasonably relied on the representations made by Mexico through Ambassador Gutierrez Evia and engaged in further meetings with the Ambassador and his staff during the review by Mexico of its obligation to the heirs.

44. In reasonable reliance on Mexico's representations the heirs' representatives met with Ambassador Gutierrez Evia and his staff on a variety of occasions between September, 1977, and March, 1978, in Mexico City and New York City to discuss Mexico's obligation to the heirs, and did not pursue other avenues of recourse to require Mexico to satisfy its obligation.

45. On information and belief, Plaintiffs allege that in or about March, 1978, Ambassador Gutierrez Evia and his staff concluded that Mexico had a present obligation to pay the heirs' land grant related claims. Thereafter, however, Ambassador Gutierrez Evia did not meet further with the heirs' representatives to discuss payment of the claims.

46. In January of 1980, representatives of the heirs met twice in Mexico with Ambassador Sergio Gonzales Galvez, who had succeeded Ambassador Gutierrez Evia as head of the Legal Advisor's Office, to discuss payment by Mexico on the heirs' land grant related claims.

47. In these meetings, Ambassador Gonzalez Galvez stated that the decision had been made "by the highest authorities" in the Mexican Government that Mexico would promptly pay the compensation owed on the heirs' land grant related claims.

48. Ambassador Gonzalez Galvez further stated that in order to establish the mechanism by which the claims would be paid, Mexico's Treasury Department would immediately proceed to draft legislation for submission to and enactment by the Mexican Congress when it convened in September, 1980.

49. Ambassador Gonzalez Galvez then informed the heirs' attorneys and representatives that a meeting had been arranged for them with the Mexican Treasury Department on January 9, 1980, with the approval of the "highest authorities" in the Mexican Government.

50. Thereafter, the heirs' attorneys, accompanied by three representatives of the Mexican Foreign Ministry, met with representatives of the Treasury Department on the designated date.

51. In that meeting the heirs' representatives were told by the Treasury Department's representatives that the legislation to establish the mechanisms to pay the land grant related claims would be drafted in the near future and ready for submission in September 1980, to the Mexican Congress.

52. After their January, 1980, meetings with representatives of the Mexican Government, the heirs' attorneys received a letter dated January 23, 1980, from the Mexican Treasury Department, signed by C. P. Roberto Dieguez Arams, chief of the Office of Public Debt, and a telegram from Ambassador Gonzalez Galvez dated March 5, 1980. A copy of the letter, with an English translation, is attached as Exhibit G, and a copy of the telegram, with an English translation, is attached as Exhibit H. These communications acknowledged and reiterated Mexico's intention to proceed expeditiously to compensate the heirs.

53. The heirs and their representatives reasonably relied on Mexico's oral and written representations, from 1941 through 1980, that it would pay the heirs claims.

54. In reasonable reliance upon the representations made by Mexico as set forth above, the heirs and their representatives, including Plaintiffs, engaged in substantial work, requiring several thousand hours of research, analysis and preparation to present their position to the Mexican Legal Advisor's Office, and incurred expenses in excess of $100,000.

55. The legislation which the Mexican Government's representatives indicated in the January, 1980, meetings would be drafted and submitted to the Mexican Congress was never drafted nor submitted to the Congress.

56. In or about May, 1980, the heirs' representatives were advised by the Mexican Foreign Ministry that it was uncertain when steps would be taken to bring about the payment of the claims. Notwithstanding the continued efforts of the heirs to resolve this matter short of litigation, to date no steps have been taken by Mexico to bring about such payment.

Mexico's Jurisdictionally Relevant Contacts With The United States.

57. Paragraphs 1 through 56 set forth above are incorporated herein by reference.

58. In addition to 28 U.S.C. § 1330(b), and contacts with the United States relating to the land grant claims at issue herein, each of which would be sufficient in themselves to sustain the exercise of personal jurisdiction over Mexico in this action, Plaintiffs allege on information and belief that Mexico has other substantial and numerous contacts with the United States. Those contacts, which are also sufficient in themselves to sustain the exercise of personal jurisdiction over Mexico in this action, include:

a. ownership and operation of a commercial air carrier which serves many cities in the United States;

b. operation in many cities of offices promoting tourism to Mexico;

c. sale and delivery of petroleum products, natural gas, vegetables and other products to entities in the United States; and

d. marketing of its or its agencies' securities in the United States.

VI. *CLASS CLAIM*

59. Paragraphs 1 through 58 set forth above are incorporated herein by reference.

60. As set forth above, in or about 1925 Mexico filed 433 land grant related loss claims against the United States with the General Claims Commission on behalf of the class members and their families as heirs of recipients of grants of land in Texas.

61. The 433 claims Mexico filed were individually valued by Mexico in 1925 as indicated in the claims booklet attached hereto as Exhibit C at $193,658,954.60.

62. By virtue of Mexico's use, taking and confiscation of the claims referred to above without payment of just compensation, Mexico has violated the rights in property in the United States possessed by members of the Class and their families. Plaintiffs are therefore entitled to compensation from Mexico for such use, taking and confiscation of their property or that of their family members in an amount not less than $193,658,954.60, plus interest since at least 1941.

63. For its own public purposes Mexico asserted against the United States the claims of the Plaintiff Class and their families for the taking of their property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate the Class for these claims, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to the Plaintiff Class to compensate them for the taking of their property and has become liable to pay the Class members an amount not less than the value of the claims Defendant asserted against the United States, *i.e.*, $193,658,954.60 plus interest since at least 1941.

64. Mexico solicited or otherwise acquired the claims of the Plaintiff Class members for the taking of their property, and having received valuable consideration therefor, has tortiously failed and omitted to return the value of said claims to members of the Class. Mexico is thus liable to pay the Class members damages for the loss of their property arising from this tortious conduct in an amount not less than the value of the claims, *i.e.*, $193,658,954.60 plus interest since at least 1941.

VII. *CLAIM OF AMINTA ZARATE*

65. Plaintiff Aminta Zarate incorporates herein by reference paragraphs 1 through 64 set forth above.

66. Plaintiff Zarate is a direct descendent and heir of Jose Narciso Cavazos and Francisco Guerra, each of whom received one or more grants of land in Texas from Spain or Mexico, and Manuela Montemayor Cardenas who was, pursuant to a public sale in or about 1802, the successor in interest of the rights of Juan Jose Balli to land in Texas granted him by Spain.

67. In or about 1925 Mexico filed land grant related loss claims against the United States with the General Claims Commission on behalf of the heirs of Jose Narciso Cavazos, Francisco Guerra and Juan Jose Balli. The claim on behalf of the heirs of Jose Narciso Cavazos, valued by Mexico in 1925 at $12,100,000.00 plus interest, was assigned docket number 1081 by the General Claims Commission. The claim on behalf of the heirs of Francisco Guerra, valued by Mexico in 1925 at $44,280.00 plus interest, was assigned docket number 1153 by the General Claims Commission. The claim on behalf of the heirs of Juan Jose Balli, valued by Mexico in 1925 at $13,784,000.00 plus interest, was assigned docket number 1105 by the General Claims Commission.

68. Plaintiff Zarate has succeeded by inheritance to the rights of her ancestors in these claims.

69. By virtue of Mexico's use, taking and confiscation of the claims referred to in paragraph 67 above without

payment of just compensation, Mexico has violated the rights in property in the United States possessed by Plaintiff Zarate and by her family. Plaintiff is therefor entitled to compensation from Mexico for such use, taking and confiscation of her property or that of her family members in an amount not less than her rightful share of $25,928,280.00 plus interest since at least 1941.

70. For its own public purposes Mexico asserted against the United States the claims of Plaintiff Zarate and her family for the taking of their property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate Plaintiff Zarate for these claims, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to Plaintiff Zarate to compensate her for the taking of her property and has become liable to pay to Plaintiff Zarate an amount not less than her rightful share of the value of the claims which Defendant asserted against the United States, *i.e.*, $25,928,280.00 plus interest since at least 1941.

71. Mexico solicited or otherwise acquired the claims of Plaintiff Zarate and her family for compensation for the taking of their property, and having received valuable consideration therefor has tortiously failed and omitted to return the value of said claims to Plaintiff Zarate. Mexico is thus liable to pay Plaintiff Zarate damages for the loss of the property arising from this tortious conduct in an amount not less than her rightful share of the value of the claims, *i.e.*, $25,928,280.00 plus interest since at least 1941.

VIII. *CLAIM OF LUIS RIOJAS*

72. Plaintiff Luis Riojas incorporates herein by reference paragraphs 1 through 64 set forth above.

73. Plaintiff Riojas is a descendant and heir of Ignacio Galindo, who received two grants of land in Texas from Spain.

74. In or about 1925 Mexico filed two land grant related loss claims against the United States with the General Claims Commission on behalf of the heirs of Ignacio Galindo. The claims on behalf of the heirs of Ignacio Galindo were assigned docket numbers 2860 and 3061 by the General Claims Commission. The claim assigned docket number 2860 was valued by Mexico in 1925 at $487,080.00 plus interest while the claim assigned docket number 3061 was valued at that date at $974,160.00 plus interest.

75. Plaintiff Riojas has succeeded by inheritance to the rights of his ancestors in these claims.

76. By virtue of Mexico's use, taking and confiscation of the claims referred to in paragraph 74 above without payment of just compensation, Mexico has violated the rights in property in the United States possessed by Plaintiff Riojas and his family. Plaintiff is therefor entitled to compensation from Mexico for such use, taking and confiscation of his property or that of his family members in an amount not less than his rightful share of $1,461,240.00 plus interest since at least 1941.

77. For its own public purposes Mexico asserted against the United States the claims of Plaintiff Riojas and his family for the taking of their property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate Plaintiff Riojas for these claims, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to Plaintiff Riojas to compensate him for the taking of the property and has become liable to pay to Plaintiff Riojas an amount not less than his rightful share of the value of

their claims which Defendant asserted against the United States, *i.e.*, $1,461,240.00 plus interest since at least 1941.

78. Mexico solicited or otherwise acquired the claims of Plaintiff Riojas and his family for compensation for the taking of their property, and having received valuable consideration therefor has tortiously failed and omitted to return the value of said claims to Plaintiff Riojas. Mexico is thus liable to pay Plaintiff Riojas damages for the loss of the property arising from this tortious conduct in an amount not less than his rightful share of the value of the claims, *i.e.*, $1,461,240.00 plus interest since at least 1941.

IX. *CLAIM OF FELIPA FLORES BENAVIDEZ*

79. Plaintiff Felipa Flores Benavidez incorporates by reference paragraphs 1 through 64 set forth above.

80. Plaintiff Felipa Flores Benavidez is a direct descendant and heir of Juan Flores, who received two grants of land in Texas from Spain.

81. In or about 1925 Mexico filed two land grant related loss claims against the United States with the General Claims Commission on behalf of the heirs of Juan Flores. The claims on behalf of the heirs of Juan Flores were assigned docket numbers 1084 and 2833 by the General Claims Commission. The claim assigned docket number 1084 was valued by Mexico in 1925 at $354,260.00 plus interest while the claim assigned docket number 2833 was valued at that date at $354,240.00 plus interest.

82. Plaintiff Flores Benavidez has succeeded by inheritance to the rights of her ancestors in these claims.

83. By virtue of Mexico's use, taking and confiscation of the claims referred to in paragraph 81 above without payment of just compensation, Mexico has violated the rights in property in the United States possessed by Plaintiff Flores Benavidez and by her family. Plaintiff is

therefor entitled to compensation from Mexico for such use, taking and confiscation of her property or that of her family members in an amount not less than her rightful share of $708,500.00 plus interest since at least 1941.

84. For its own public purposes Mexico asserted against the United States the claims of Plaintiff Flores Benavidez and her family for the taking of their property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate Plaintiff Flores Benavidez for these claims, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to Plaintiff Flores Benavidez to compensate her for the taking of the property and has become liable to pay to Plaintiff Flores Benavidez an amount not less than her rightful share of the value of the claims which Defendant asserted against the United States, *i.e.*, $708,500.00 plus interest since at least 1941.

85. Mexico solicited or otherwise acquired the claims of Plaintiff Flores Benavidez and her family for compensation for the taking of their property, and having received valuable consideration therefor has tortiously failed and omitted to return the value of said claims to Plaintiff Flores Benavidez. Mexico is thus liable to pay Plaintiff Flores Benavidez damages for the loss of the property arising from this tortious conduct in an amount not less than her rightful share of the value of the claims, i.e., $708,500.00 plus interest since at least 1941.

X. *CLAIM OF MARIA AGUIRRE DE SCHULTZ*

86. Plaintiff Maria Aguirre de Schultz incorporates by reference paragraphs 1 through 64 set forth above.

87. Plaintiff Aguirre de Schultz is a descendant and heir of Manuel de los Santos Coy, who received a grant of land in Texas from Spain.

88. In or about 1925 Mexico filed a land grant related loss claim against the United States with the General Claims Commission on behalf of the heirs of Manuel de los Santos Coy. The claim on behalf of the heirs of Manuel de los Santos Coy was assigned docket number 2776 by the General Claims Commission and was valued by Mexico in 1925 at $332,100.00 plus interest.

89. Plaintiff Aguirre de Schultz has succeeded by inheritance to the rights of her ancestors in this claim.

90. By virtue of Mexico's use, taking and confiscation of the claim referred to in paragraph 88 above without payment of just conpensation, Mexico has violated the rights in property in the United States possessed by Plaintiff Aguirre de Schultz and by her family. Plaintiff is therefor entitled to compensation from Mexico for such use, taking and confiscation of her property or that of her family members in an amount not less than her rightful share of $332,100.00 plus interest since at least 1941.

91. For its own public purposes Mexico asserted against the United States the claim of Plaintiff Aguirre de Schultz and her family for the taking of their property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate Plaintiff Aguirre de Schultz for this claim, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to Plaintiff Aguirre de Schultz to compensate her for the taking of the property and has become liable to pay to Plaintiff Aguirre de Schultz an amount not less than her rightful share of the value of the claim which Defendant asserted against the United States, *i.e.*, $332,100.00 plus interest since at least 1941.

92. Mexico solicited or otherwise acquired the claim of Plaintiff Aguirre de Schultz and her family for compensation for the taking of their property, and having

received valuable consideration therefor has tortiously failed and omitted to return the value of said claim to Plaintiff Aguirre de Schultz. Mexico is thus liable to pay Plaintiff Aguirre de Schultz damages for the loss of the property arising from this tortious conduct in an amount not less than her rightful share of the value of the claim, *i.e.*, $332,100.00 plus interest since at least 1941.

XI. *CLAIM OF NIEVES GUERRERO CHAPA*

93. Plaintiff Nieves Guerrero Chapa incorporates herein by reference paragraphs 1 through 64 set forth above.

94. Plaintiff Guerrero Chapa is a descendant and heir of Luciano Chapa, who received two grants of land in Texas from Mexico.

95. In or about 1925 Mexico filed two land grant related loss claims against the United States with the General Claims Commission on behalf of the heirs of Luciano Chapa. The claims on behalf of the heirs of Luciano Chapa were assigned docket numbers 2831 and 3046 by the General Claims Commission. The claim assigned docket number 2831 was valued by Mexico in 1925 at $354,240.00 plus interest while the claim assigned docket number 3046 was valued at that date at $797,040.00 plus interest.

96. Plaintiff Guerrero Chapa has succeeded by inheritance to the rights of his ancestors in these claims.

97. By virtue of Mexico's use, taking and confiscation of the claims referred to in paragraph 95 above without payment of just compensation, Mexico has violated the rights in property in the United States possessed by Plaintiff Guerrero Chapa and by his family. Plaintiff is therefor entitled to compensation from Mexico for such use, taking and confiscation of his property or that of his family members in an amount not less than his right-

ful share of $1,151,280.00 plus interest since at least 1941.

98. For its own public purposes Mexico asserted against the United States the claims of Plaintiff Guerrero Chapa and his family for the taking of the property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate Plaintiff Guerrero Chapa for these claims, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to Plaintiff Guerrero Chapa to compensate him for the taking of the property and has become liable to pay to Plaintiff Guerrero Chapa an amount not less than his rightful share of the value of the claims which Defendant asserted against the United States, *i.e.*, $1,151,280.00 plus interest since at least 1941.

99. Mexico solicited or otherwise acquired the claims of Plaintiff Guerrero Chapa and his family for compensation for the taking of their property, and having received valuable consideration therefor has tortiously failed and omitted to return the value of said claims to Plaintiff Guerrero Chapa. Mexico is thus liable to pay Plaintiff Guerrero Chapa damages for the loss of their property arising from this tortious conduct in an amount not less than his rightful share of the value of the claims, *i.e.*, $1,151,280.00 plus interest since at least 1941.

XII. *CLAIM OF SANTOS ZARATE PRIETO*

100. Plaintiff Santos Zarate Prieto incorporates herein by reference paragraphs 1 through 64 set forth above.

101. Plaintiff Zarate Prieto is a direct descendant and heir of Jose Elizondo and Ignacio Villarreal, each of whom received a grant of land in Texas from Mexico.

102. In or about 1925 Mexico filed land grant related loss claims against the United States with the General

Claims Commission on behalf of the heirs of Jose Elizondo and Ignacio Villarreal. The claim of behalf of the heirs of Jose Elizondo, valued by Mexico in 1925 at $487,080.00 plus interest, was assigned docket number 2855 of the General Claims Commission. The claim on behalf of the heirs of Ignacio Villarreal, valued by Mexico in 1925 at $442,800.00 plus interest, was assigned docket number 3011 by the General Claims Commission.

103. Plaintiff Zarate Prieto has succeeded by inheritance to the rights of her ancestors in these claims.

104. By virtue of Mexico's use, taking and confiscation of the claims referred to in paragraph 102 above without payment of just compensation, Mexico has violated the rights in property in the United States possessed by Plaintiff Zarate Prieto and by her family. Plaintiff is therefor entitled to compensation from Mexico for such use, taking and confiscation of her property or that of her family members in an amount no less than her rightful share of $929,880.00 plus interest since at least 1941.

105. For its own public purposes Mexico asserted against the United States the claims of Plaintiff Zarate Prieto and her family for the taking of their property, released the United States from liability for those claims under the 1941 Treaty in exchange for valuable consideration, and thereby assumed and became liable to compensate Plaintiff Zarate Prieto for these claims, but has failed to do so. By these acts, the Defendant has breached its fiduciary duty and other legal obligations, express and implied, to Plaintiff Zarate Prieto to compensate her for the taking of the property and has become liable to pay to Plaintiff Zarate Prieto an amount not less than her rightful share of the value of the claims which Defendant asserted against the United States, *i.e.*, $929,880.00 plus interest since at least 1941.

106. Mexico solicited or otherwise acquired the claims of Plaintiff Zarate Prieto and her family for compensation for the taking of their property, and having re-

ceived valuable consideration therefor has tortiously failed and omitted to return the value of said claims to Plaintiff Zarate Prieto. Mexico is thus liable to pay Plaintiff Zarate Prieto damages for the loss of the property arising from this tortious conduct in an amount not less than her rightful share of the value of the claims, *i.e.*, $929,880.00 plus interest since at least 1941.

XIII. *CLAIM OF ASOCIACION DE RECLAMANTES*

107. Plaintiff Asociacion de Reclamantes incorporates herein by reference Paragraphs 1 through 106 set forth above.

108. In January, 1978, the individual Plaintiffs, and other Class members and descendants of the original grantees of the 433 land grants described above, established the Asociacion de Reclamantes to assist them in securing compensation from Mexico. The Asociacion's membership of some 2,000 persons includes heirs of approximately 290 of the 433 original Spanish and Mexican land grantees for whom Mexico filed claims with the General Claims Commission.

109. Plaintiff Asociacion de Reclamantes has incurred expenses in seeking to obtain compensation owed its members from Mexico. These expenses were incurred in reliance on Mexico's representations to the land grant heirs and their representatives set forth above. Plaintiff Asociacion de Reclamantes seeks to recover these expenses from Defendant Mexico as damages caused by Mexico's wrongful failure to compensate the heirs.

110. On behalf of its members, who have been injured by Defendant Mexico's wrongful failure to compensate them monies owed, the Asociacion de Reclamantes seeks a declaratory judgment that

> a) Mexico has used, taken and confiscated the claims of the heirs of the 433 land grantees listed in Exhibit C to this Complaint without payment of just compensation, and

b) Mexico has breached its fiduciary duty and other legal obligations to the said heirs by having asserted and released their claims against the United States without having compensated said heirs for the loss of their property; and

c) Mexico has tortiously failed and omitted to return the value of said claims to said heirs; and

d) Mexico is accordingly liable to compensate said heirs in an amount not less than the value which Mexico placed on such claims in 1925, $193,658,954.60 plus interest.

WHEREFORE, Plaintiffs Asociacion de Reclamantes, Aminta Zarate, Luis Riojas, Felipa Flores Benavidez, Maria Aguirre de Schultz, Nieves Guerrero Chapa, and Santos Zarate Prieto pray that the Court order the following relief:

A. Payment by Mexico of all monies owed the individual Plaintiffs and other Class members for the value of the land grant related claims asserted on their behalf, including interest thereon;

B. Payment by Mexico of all other damages incurred by Plaintiffs as a result of the wrongful failure of Mexico to pay these claims;

C. Payment by Mexico of costs and expenses incurred by Plaintiffs and the Class in this action, including attorneys' fees;

D. Placing of all funds received or paid in satisfaction of Mexico's liability to Class members into a fund, the distribution of which shall be supervised by the Court under an appropriate procedure to be determined;

E. On behalf of Plaintiff Asociacion de Reclamantes, a Declaratory Judgment as set forth in Paragraph 110 above; and

F. Such other and further relief as the Court deems just and proper.

BARON, FAULKNER &
SALAZAR, P. C.

/s/ Robert J. Salazar
ROBERT J. SALAZAR
550 Writer Square
1512 Larimer Street
Denver, Colorado 80202
(303) 572-3066

RUSSELL E. VIGIL, ESQ.

/s/ Russel E. Vigil
3271 South Clay Street
Englewood, Colorado 80110
(303) 781-7359

JESS J. ARAUJO, ESQ.

/s/ Jess J. Araujo
Suite 206
1200 North Main Street
Santa Ana, California 92701
(714) 835-6990

ROGOVIN, HUGE & LENZNER

/s/ Mitchell Rogovin
MITCHELL ROGOVIN
GEORGE T. FRAMPTON, JR.
VICKI C. JACKSON
1730 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 466-6464

Attorneys for Plaintiffs
Asociacion de Reclamantes,
Aminta Zarate, Luis Riojas,
Felipa Flores Benavidez,
Maria Aguirre de Schultz,
Nieves Guerrero Chapa, and
Santos Zarate Prieto

[Most Exhibits Omitted; Exhibit B Follows]

EXHIBIT B TO AMENDED COMPLAINT
[English version; Spanish version omitted in printing]

No. 254

BEFORE THE GENERAL CLAIMS COMMISSION

BETWEEN THE
UNITED MEXICAN STATES AND THE
UNITED STATES OF AMERICA
(Under Convention concluded September 8, 1923)

Docket No. 1203

UNITED MEXICAN STATES
on behalf of
THE HEIRS OF MATIAS LONGORIA

against

UNITED STATES OF AMERICA

MEMORANDUM OF CLAIM

Under Rule III, Section 2, Clause (a)

NAME AND ADDRESS OF CLAIMANT:

The Heirs of Matias Longoria
801 Hibbs Bldg.
Washington, D.C.

CHARACTER AND AMOUNT OF CLAIM:

Claimant deprived of property by the authorities of the United States of America.

$167,300.00 U.S. Currency.

(Proper allowance of interest is also claimed.)

MEMORANDUM

Claimants are the Heirs of Matias Longoria, natural born citizen of the United Mexican States, and resident of H. Matamoros, Tampo, Mexico, sets [sic] forth that the sole heir of Matias Longoria un cuidadano Mexicano, deceased ..... (legal proof of which will hereafter be submitted), who, on, or about the ..... day of ..... in the year ....., was in pursuance of legal authority, granted a certain tract of land, located in State of Coahuila and Texas in what is now the State of Texas, in the United States of America, as shown by the archives of the said Province, and more particularly described as follows: 45,000,000 sq. Varas, abstract No. 129, Starr County, Texas, approximately 7865 acres.

When the territory in which said lands were located passed to the sovereignty of the United States of America, the rights of said grantee and his heirs, all natural born citizens of the United Mexican States, were duly respected, except from trespass, until the year 1870, when the State of Texas as a State of the United States of America, then and thereafter assumed to enact certain laws, to wit: The Act of August 15, 1870, entitled "AN ACT TO ASCERTAIN AND ADJUDICATE CERTAIN CLAIMS FOR LAND AGAINST THE STATE SITUATED BETWEEN THE NUECES AND RIO GRANDE RIVERS" and other acts, thereby and by other means depriving said heir of ..... rights to said land or the right to enter thereon, all in violation of the laws of the United States of America, international law and guarantees provided by the TREATY OF GUADALUPE HIDALGO, between Mexico and the United States, of 1848; and that the claimant having thus been deprived of ..... property, as herein described, without due process of law, and without just compensation, hereby make this claim against the United States of America for the restoration to claimant, the legitimate

owner of said lands, or for payment of its value, to wit: $157,300.00 U.S. Currency, plus interest.

POR EL ASENTE DE MEXICO

THE MEXICAN AGENT

By B. Carbajaly Rosas

CERTIFICATE OF SERVICE

I hereby certify that the foregoing First Amended Class Action Complaint for Taking of Property was, this 18th day of December, 1981, served on counsel for the defendant by hand-delivery of a copy of same addressed to:

John H. Shenefield
Peter E. Halle
Milbank, Tweed, Hadley & McCloy
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

/s/ Vicki C. Jackson
VICKI C. JACKSON

December 18, 1981

APPENDIX E

28 U.S.C.

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

* * * *

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in the United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the

United States and of the States in conformity with the principles set forth in this chapter.

* * * *

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States

by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

* * * *

September 8, 1923

Convention between the United States and Mexico for reciprocal settlement of claims. Signed at Washington, September 8, 1923; ratification advised by the Senate, January 23, 1924; ratified by the President, February 4, 1924; ratified by Mexico, February 16, 1924; ratifications exchanged at Washington, March 1, 1924; proclaimed, March 3, 1924.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a Convention between the United States of America and the United Mexican States providing for the amicable settlement and adjustment of claims by the citizens of each country against the other, was concluded and signed by their respective Plenipotentiaries at Washington on the eighth day of September, one thousand nine hundred and twenty-three, the original of which Convention, being in the English and Spanish languages is word for word as follows:

[Spanish omitted]

The United States of America and the United Mexican States, desiring to settle and adjust amicably claims by the citizens of each country against the other since the signing on July 4, 1868, of the Claims Convention entered into between the two countries (without including the claims for losses or damages growing out of the revolutionary disturbances in Mexico which form the basis of another and separate Convention), have decided to enter into a Convention with this object, and to this end have nominated as their Plenipotentiaries:

The President of the United States of America:

The Honorables Charles Evans Hughes, Secretary of State of the United States of America, Charles Beecher Warren and John Barton Payne, and

The President of the United Mexican States:

Senor Don Manuel C. Tellez, Charge d'Affaires ad interim of the United Mexican States at Washington;

Who, after having communicated to each other their respective full powers found to be in due and proper form, have agreed upon the following Articles:

ARTICLE I.

All claims (except those arising from acts incident to the recent revolutions) against Mexico of citizens of the United States, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties, and all claims against the United States of America by citizens of Mexico, whether corporations, companies, associations, partnerships or individuals, for losses or damages suffered by persons or by their properties; all claims for losses or damages suffered by citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to; and all claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice, and which claims may have been presented to either Government for its interposition with the other since the signing of the Claims Convention concluded between the two countries July 4, 1868, and which have remained unsettled, as well as any other such claims which may be filed by either Government within the time hereinafter specified, shall be submitted to a Commission consisting of three members for decision in accordance with the principles of international law, justice and equity.

Such Commission shall be constituted as follows: one member shall be appointed by the President of the United States; one by the President of the United Mexican States; and the third, who shall preside over the Commission, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within two months from the exchange of ratifications of this Convention in naming such third member, then he shall be designated by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article XLIX of the Convention for the pacific settlement of international disputes concluded at The Hague on October 18, 1907. In case of the death, absence or incapacity of any member of the Commission, or in the event of a member omitting or ceasing to act as such, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE II.

The Commissioners so named shall meet at Washington for organization within six months after the exchange of the ratifications of this Convention, and each member of the Commission, before entering upon his duties, shall make and subscribe a solemn declaration stating that he will carefully and impartially examine and decide, according to the best of his judgment and in accordance with the principles of international law, justice and equity, all claims presented for decision, and such declaration shall be entered upon the record of the proceedings of the Commission.

The Commission may fix the time and place of its subsequent meetings, either in the United States or in Mexico, as may be convenient, subject always to the special instructions of the two Governments.

ARTICLE III.

In general, the Commission shall adopt as the standard for its proceedings the rules of procedure established by the Mixed Claims Commission created under the Claims Convention between the two Governments signed July 4, 1868, in so far as such rules are not in conflict with any provision of this Convention. The Commission, however, shall have authority by the decision of the majority of its members to establish such other rules for its proceedings as may be deemed expedient and necessary, not in conflict with any of the provisions of this Convention.

Each Government may nominate and appoint agents and counsel who will be authorized to present to the Commission, orally or in writing, all the arguments deemed expedient in favor of or against any claim. The agents or counsel of either Government may offer to the Commission any documents, affidavits, interrogatories or other evidence desired in favor of or against any claim and shall have the right to examine witnesses under oath or affirmation before the Commission, in accordance with such rules of procedure as the Commission shall adopt.

The decision of the majority of the members of the Commission shall be the decision of the Commission.

The language in which the proceedings shall be conducted and recorded shall be English or Spanish.

ARTICLE IV.

The Commission shall keep an accurate record of the claims and cases submitted, and minutes of its proceedings with the dates thereof. To this end, each Government may appoint a Secretary; these Secretaries shall act as joint Secretaries of the Commission and shall be subject to its instructions. Each Government may also appoint and employ any necessary assistant secretaries and such other assistance as deemed necessary. The Commission may also appoint and employ any persons necessary to assist in the performance of its duties.

ARTICLE V.

The High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording them just and adequate compensation for their losses or damages, agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim.

ARTICLE VI.

Every such claim for loss or damage accruing prior to the signing of this Convention, shall be filed with the Commission within one year from the date of its first meeting, unless in any case reasons for the delay, satisfactory to the majority of the Commissioners, shall be established, and in any such case the period for filing the claim may be extended not to exceed six additional months.

The Commission shall be bound to hear, examine and decide, within three years from the date of its first meeting, all the claims filed, except as hereinafter provided in Article VII.

Four months after the date of the first meeting of the Commissioners, and every four months thereafter, the Commission shall submit to each Government a report setting forth in detail its work to date, including a statement of the claims filed, claims heard and claims decided. The Commission shall be bound to decide any claim heard and examined within six months after the conclusion of the hearing of such claim and to record its decision.

ARTICLE VII.

The High Contracting Parties agree that any claim for loss or damage accruing after the signing of this Convention, may be filed by either Government with the Com-

mission at any time during the period fixed in Article VI for the duration of the Commission; and it is agreed between the two Governments that should any such claim or claims be filed with the Commission prior to the termination of said Commission, and not be decided as specified in Article VI, the two Governments will by agreement extend the time within which the Commission may hear, examine and decide such claim or claims so filed for such a period as may be required for the Commission to hear, examine and decide such claim or claims.

ARTICLE VIII.

The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions. They further agree to consider the result of the proceedings of the Commission as a full, perfect and final settlement of every such claim upon either Government, for loss or damage sustained prior to the exchange of the ratifications of the present Convention (except as to claims arising from revolutionary disturbances and referred to in the preamble hereof). And they further agree that every such claim, whether or not filed and presented to the notice of, made, preferred or submitted to such Commission shall from and after the conclusion of the proceedings of the Commission be considered and treated as fully settled, barred and thenceforth inadmissible, provided the claim filed has been heard and decided.

ARTICLE IX.

The total amount awarded in all the cases decided in favor of the citizens of one country shall be deducted from the total amount awarded to the citizens of the other country and the balance shall be paid at Washington or at the City of Mexico, in gold coin or its equivalent to the Government of the country in favor of whose citizens the greater amount may have been awarded.

In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution. In any case where the Commission so decides the restitution of the property or right shall be made by the Government affected after such decision has been made, as hereinbelow provided. The Commission, however, shall at the same time determine the value of the property or right decreed to be restored and the Government affected may elect to pay the amount so fixed after the decision is made rather than to restore the property or right to the claimant.

In the event the Government affected should elect to pay the amount fixed as the value of the property or right decreed to be restored, it is agreed that notice thereof will be filed with the Commission within thirty days after the decision and that the amount fixed as the value of the property or right shall be paid immediately. Upon failure so to pay the amount the property or right shall be restored immediately.

ARTICLE X.

Each Government shall pay its own Commissioner and bear its own expenses. The expenses of the Commission including the salary of the third Commissioner shall be defrayed in equal proportions by the two Governments.

ARTICLE XI.

The present Convention shall be ratified by the High Contracting Parties in accordance with their respective Constitutions. Ratifications of this Convention shall be exchanged in Washington as soon as practicable and the Convention shall take effect on the date of the exchange of ratifications.

In witness whereof, the respective Plenipotentiaries have signed and affixed their seals to this Convention.

Done in duplicate at Washington this eighth day of September, 1923.

CHARLES EVANS HUGHES	[SEAL.]
CHARLES BEECHER WARREN	[SEAL.]
JOHN BARTON PAYNE	[SEAL.]
MANUEL C. TELLEZ	[SEAL.]

AND WHEREAS the said Convention, has been duly ratified on both parts, and the ratifications of the two governments were exchanged in the City of Washington, on the first day of March, one thousand nine hundred and twenty-four:

NOW, THEREFORE, be it known that I, Calvin Coolidge, President of the United States of America, have caused the said Convention to be made public to the end that the same and every article and clause thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States to be affixed.

DONE at the city of Washington, this third day of March, in the year of our Lord one thousand nine hundred and twenty-four, and of the [SEAL.] Independence of the United States of America the one hundred and forty-eighth.

CALVIN COOLIDGE

By the President:

CHARLES E. HUGHES
Secretary of State.

Convention between the United States of America and Mexico respecting claims. Signed at Washington November 19, 1941; ratification advised by the Senate of the United States January 29, 1942; ratified by the President of the United States February 10, 1942; ratified by Mexico February 12, 1942; ratifications exchanged at Washington April 2, 1942; proclaimed by the President of the United States April 9, 1942.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a Convention Providing for the Final Adjustment and the Settlement of Certain Unsettled Claims of Nationals of the United States of America and of the United Mexican States, respectively, against the Government of the other country, was concluded and signed by the respective Plenipotentiaries of the two countries at Washington on November 19, 1941, the original of which Convention in the English and Spanish languages, is word for word as follows:

[Spanish omitted]

The United States of America and the United Mexican States, being desirous of effecting an amicable, expeditious and final adjustment of certain unsettled claims of the nationals of each country against the Government of the other country, without resort to methods of international arbitration for their adjudication, such as those established in prior agreements, have decided to conclude a Convention for that purpose, and to this end have named as their Plenipotentiaries:

The President of the United States of America:

Mr. Cordell Hull, Secretary of State of the United States of America; and

The President of the United Mexican States:

Dr. Francisco Castillo Najera, Ambassador Extraordinary and Plenipotentiary of Mexico to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in due and proper form, have agreed upon the following articles:

ARTICLE I

The Government of the United Mexican States agrees to pay, and the Government of the United States of America agrees to accept, the sum of $40,000,000.00 (forty million dollars, currency of the United States of America), as the balance due from the Government of the United Mexican States in full settlement, liquidation, and satisfiaction of the following claims:

(a) All claims filed by the Governments of the United States of America and of the United Mexican States with the General Claims Commission, established by the two countries pursuant to the Convention signed September 8, 1923;

(b) All agrarian claims of nationals of the United States of America against the Government of the United Mexican States, which arose subsequent to August 30, 1927 and prior to October 7, 1940, including those referred to in the Agreement effected by exchange of notes signed by the Government of the United States of America and the Government of the United Mexican States on November 9 and 12, 1938, respectively; and

(c) All other claims of nationals of either country, which arose subsequent to January 1, 1927 and prior to October 7, 1940, and involving international responsibility of either Government towards the other Government as a consequence of damage to, or loss or destruction of, or wrongful interference with the property of the nationals of either country.

ARTICLE II

The Government of the United States of America and the Government of the United Mexican States agree that the following claims are not extinguished in consequence of the stipulations of this Convention:

(a) Claims of nationals of the United States of America against the Government of the United Mexican States, which arose subsequent to August 30, 1927, and are predicated upon acts of authorities of the United Mexican States in relation to petroleum properties, which claims are the subject of a special agreement;

(b) Claims of nationals of the United Mexican States against the Government of the United States of America, which were formally presented to the Government of the United States of America by the Embassy of the United Mexican States in its note number 2705 of May 16, 1941;

(c) Claims of nationals of either country, predicated upon injuries essentially personal, which arose subsequent to January 1, 1927 and prior to the date of the signing of this Convention;

(d) Claims of the nationals of either country, of the character of those included in paragraphs (b) and (c) of Article I of this Convention, which arose subsequent to October 7, 1940 and prior to the date of the signing of this Convention; and

(e) Claims of nationals of the United States of America predicated upon default in the payment of the principal or of interest on bonds issued or guaranteed by the United Mexican States, which were not filed with the Commission established pursuant to the Convention signed September 8, 1923.

The claims included in paragraphs (b), (c), and (d) of this Article will be the subject of future agreements which the two Governments will conclude as soon as possible.

ARTICLE III

The United States of America and the United Mexican States, in virtue of the stipulations of this Convention, reciprocally cancel, renounce, and hereby declare satisfied all claims, of whatsoever nature, of nationals of each country against the Government of the other, which arose prior to the date of the signing of this Convention, whether or not filed, formulated or presented, formally or informally, to either of the two Governments, except those claims which are included in Article II of this Convention.

The two Governments agree that, with respect to international obligations and rights of each Government towards the other, the stipulations of this Convention supersede the stipulations of the General Claims Convention signed September 8, 1923, and those of the Protocol signed April 24, 1934, which refers to that Convention, and those of the Agrarian Claims Agreement effected by exchange of notes signed November 9 and 12, 1938.

ARTICLE IV

There is credited against the sum of $40,000,000.00 (forty million dollars, United States currency) mentioned in Article I of this Convention the sum of $3,000,000.00 (three million dollars, United States currency), the total sum of payments made, prior to the signing of this Convention, to the Government of the United States of America by the Government of the United Mexican States pursuant to the Agreement in relation to agrarian claims, effected by the exchange of notes signed November 9 and 12, 1938. There shall also be credited the additional sum of $3,000,000.00 (three million dollars, United States currency) which will be paid on the date of the exchange of ratifications of this Convention.

The balance of $34,000,000.00 (thirty-four million dollars, United States currency) shall be paid by the Government of the United Mexican States to the Government of the United States of America at Washington, in annual instalments, beginning one year after the date of the signing of this Convention, of $2,500,000.00 (two million, five hundred thousand dollars, United States currency) until the complete liquidation of this debt. The Government of the United Mexican States may, in its discretion, for the purpose of reducing the period for complete liquidation of the balance due, increase the amount of any of the annual instalments, or pay any such instalment or instalments in advance.

In consideration of the stipulations of this Convention it is agreed that the United Mexican States is relieved of the obligation to make further payments pursuant to the provisions of the Agreement in relation to agrarian claims effected by the exchange of notes signed November 9 and 12, 1938.

ARTICLE V

In the event of failure to pay any annual instalment, or instalments, when due, the United Mexican States shall pay interest at the rate of one per centum per annum on the amount of each such instalment, or instalments, from the date when the instalment, or instalments, became due up to the date of the payment.

ARTICLE VI

This Convention shall be ratified and shall become effective upon the exchange of ratifications which shall take place at Washington as soon as possible.

IN WITNESS WHEREOF, the respective Plenipotentiaries have signed and affixed their seals to this Convention.

DONE in duplicate, in English and Spanish, at Washington, this nineteenth day of November, 1941.

[SEAL] CORDELL HULL

[SELLO] F. CASTILLO NAJERA

AND WHEREAS, the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged at the city of Washington on the second day of April, one thousand nine hundred and forty-two;

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Convention to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this ninth day of April, in the year of our Lord one thousand
[SEAL] nine hundred and forty-two, and of the Independence of the United States of America the one hundred and sixty-sixth.

FRANKLIN D ROOSEVELT

By the President:

SUMNER WELLES
Acting Secretary of State.

FIFTH AMENDMENT, U.S. Constitution

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * *

FOURTEENTH AMENDMENT, U.S. Constitution

SECTION 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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FILED
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ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ASOCIACION DE RECLAMANTES, AMINTA ZARATE, LUIS RIOJAS, FELIPA FLORES BENAVIDEZ, MARIA AGUIRRE DE SCHULTZ, NIEVES GUERRERO CHAPA, SANTOS ZARATE PRIETO,
Petitioners,

v.

THE UNITED MEXICAN STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE UNITED MEXICAN STATES IN OPPOSITION

JOHN H. SHENEFIELD*
DOROTHY ASHLEY DOHERTY
D. STEPHEN MATHIAS
CAROL A. CORCORAN
MILBANK, TWEED, HADLEY & MCCLOY
1825 Eye Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 835-7500

* *Counsel of Record*

February 20, 1985

PANDICK WASHINGTON, D.C.—1901 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

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33 pp

QUESTION PRESENTED

Whether, despite the general rule of sovereign immunity established by the Foreign Sovereign Immunities Act, the United Mexican States ("Mexico") may be sued in a U.S. court on intangible claims for monetary compensation arising from claims that were originally espoused by Mexico on behalf of Mexican nationals and their heirs and subsequently extinguished pursuant to a 1941 bilateral claims settlement treaty, on the ground that the suit is one in which "rights in immovable property situated in the United States are in issue," even though those claims in no way affect title to, or possession or use of, land in the United States.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-992

ASOCIACION DE RECLAMANTES, AMINTA ZARATE, LUIS RIOJAS, FELIPA FLORES BENAVIDEZ, MARIA AGUIRRE DE SCHULTZ, NIEVES GUERRERO CHAPA, SANTOS ZARATE PRIETO,
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THE UNITED MEXICAN STATES,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE UNITED MEXICAN STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Asociacion de Reclamantes v. The United Mexican States,* is reported at 735 F.2d 1517 (D.C. Cir. 1984) and reproduced in Petitioners' Appendix ("Pet. App.") at pages 1a-15a. The opinion of the United States District Court for the District of Columbia is reported at 561 F. Supp. 1190 (D.D.C. 1983) and reproduced in Petitioners' Appendix at pages 17a-38a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1984. A petition for rehearing was denied on August 28, 1984. On January 2, 1985, the time within which Respondent

was permitted to file its brief in opposition to the petition for a writ of certiorari was extended to and including February 20, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1982).

STATUTE INVOLVED

The petition involves the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611 (1982). Relevant portions of this statute are reproduced in Appendix A to this Brief.

STATEMENT OF THE CASE

Historical Background

Prior to 1848, both Mexico and Spain made grants of land located in what is now Texas. In subsequent years, many of the grantees, their heirs and descendants were driven off their land illegally. On September 8, 1923, the United States and Mexico entered into a Treaty on General Claims, Sept. 8, 1923, United States-Mexico, 43 Stat. 1730, T.S. No. 678 (the "1923 Treaty"). That treaty established a general claims commission, to which each nation was to submit, for adjudication, any claims of its citizens against the other country. 1923 Treaty, art. I. Mexico filed claims with, and sought redress from, this commission, on behalf of those grantees who had lost their land.

Protracted delays prompted the United States and Mexico to enter into another agreement on the settlement of claims. Protocol Relative to General Claims, Apr. 24, 1934, United States-Mexico, 49 Stat. 3531, E.A.S. No. 57 (the "1934 Protocol"). Pursuant to that agreement, the United States and Mexico agreed "to effect a more expeditious and more economical disposition of the claims either by means of an *en bloc* settlement or a more simplified method of adjudication." 1934 Protocol, 49 Stat. at 3532.

The general claims commission set up by the 1923 Treaty and extended by the 1934 Protocol failed to resolve any of the claims submitted by Mexico on behalf of the grantees, and its authority to hear claims expired in 1936. Thereafter, negotiations between the two sovereigns were resumed and Mexico resubmitted the claims for diplomatic settlement. The negotiations culminated in the Treaty on Final Settlement of Certain Claims, Nov. 19, 1941, United States-Mexico, 56 Stat. 1347, T.S. No. 980 (the "1941 Treaty"). By the terms of this Treaty, Mexico agreed to pay $40 million in full settlement, liquidation and satisfaction of the unadjudicated claims previously filed by both countries with the general claims commission. Both countries agreed to "reciprocally cancel, renounce, and hereby declare satisfied all claims, of whatsoever nature, of nationals of each country against the Government of the other." 1941 Treaty, art. III.

The 1941 Treaty was not self-executing and required that both countries enact legislation prior to the settlement of any claims. In 1942, the U.S. Congress enacted legislation setting up a Mexican-American Claims Commission to provide for the settlement of claims held by U.S. nationals and espoused by the United States in the treaty negotiations. Settlement of Mexican Claims Act of 1942, Pub. L. No. 814, 56 Stat. 1058 (1942).

Concurrently with Mexico's payments to the United States for the benefit of claims held by U.S. nationals, the President of Mexico issued a decree stating:

> Whereas it is the duty of the Government to tend to said claims of our nationals in order to satisfy them in accordance with the role they played in the recently concluded Convention with our neighbor country to the North and in accordance with the rules *ex aequo et bono;* as already manifested publicly in the Bulletins and official declarations made as a result of the signing of the aforementioned Convention regarding the claims.

> Whereas the claims [against the United States that were settled by the 1941 Treaty] referred to have lost their international character, and have become *internal responsibilities of our government . . . as only one of our many domestic pecuniary responsibilities.*
>
> Whereas it is necessary to have a law enacted by the honorable Congress of the Union indicating the appropriate procedure for evaluating the claims referred to in this Decree, to judge them and to ascribe to them the compensation to which they are entitled . . . .
>
> . . . . .
>
> . . . I have found it proper to order the following:
>
> **Decree**
>
> I. The Secretariat of Finance shall immediately proceed to study and prepare a draft legislative initiative, which shall be submitted to the honorable Congress of the Union, for the settlement, valuation, and payment of the Mexican claims presented to the extinct General Claims Commission . . . .

Decree of President Manuel Avila Camacho, 129 Diario Oficial § 5 (Dec. 31, 1941) [translation from Spanish] (emphasis added). While legislation necessary to establish a mechanism to adjudicate and pay the claims has not yet been submitted to the Mexican Congress, access to the Mexican courts remains available to Petitioners for the pursuit of their claims. Mex. Const. art. XVII.

The Complaint

Petitioners allege that they are descendants, heirs, and successors of the original grantees from Spain and Mexico of

land in Texas, whose land was taken illegally. Pet. App. at 50a. Alleging jurisdiction under the FSIA, Petitioners filed suit in the United States District Court for the District of Columbia. In their complaint, they sought the value of their predecessors' claims, alleged to be at least $193 million in 1941, plus interest. Petitioners also sought money damages to be paid into a fund, "the distribution of which shall be supervised by the court under an appropriate procedure to be determined." Pet. App. at 71a.

The Decisions Below

In granting Mexico's motion to dismiss, the District Court rejected Petitioners' contention that their allegations state a case in which "rights in immovable property situated in the United States are in issue" under § 1605(a)(4) of the FSIA, finding instead that the claims concerned "intangible property rights created through the diplomatic process." Pet. App. at 29a. The District Court also rejected Petitioners' argument that the fact that legislation necessary to establish a mechanism to adjudicate and pay claims has not yet been submitted to the Mexican Congress amounted to tortious conduct within the meaning of § 1605(a)(5) of the FSIA. Accordingly, the District Court held that, as a sovereign foreign state, Mexico was immune from jurisdiction, and, in addition, that the Act of State doctrine would prohibit adjudication on the merits even if jurisdiction had existed. *Id.* at 37a.

The Court of Appeals affirmed the District Court's dismissal, holding that neither the "rights in immovable property" nor the "tortious act" exception of the FSIA was applicable. *Id.* at 13a. The Court of Appeals held that Congress, in enacting the FSIA, intended to codify "the preexisting real property exception to sovereign immunity recognized by international practice," *id.* at 7a, which was limited to disputes "directly implicating property interests or rights to possession." *Id.* at 9a. The Court of Appeals also declined to find jurisdiction under the "tortious act" exception to the FSIA, ruling that Mexico's conduct lacked the required nexus with the United States, *id.* at 14a, and declined to reach the Act of State question.

ARGUMENT

The Court of Appeals' well-reasoned opinion is correct, does not conflict with any decision of this Court or of any court of appeals, and does not present any issue warranting review. The only issue before the Court of Appeals was whether United States courts have subject matter jurisdiction under the Foreign Sovereign Immunities Act over claims like Petitioners'. The Court of Appeals' carefully circumscribed construction of the FSIA's "immovable property" exception to foreign sovereign immunity is wholly consistent with the plain language, purpose and legislative history of the FSIA, and its application of that construction to the facts of this case is correct.

Bachman v. Lawson, 109 U.S. 659 (1884), and *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), on which Petitioners principally rely, are irrelevant to this case. Neither case holds or even implies that Petitioners' claims ever constituted rights in "immovable property" within the meaning of the FSIA, much less that they have that character today.

Petitioners' assertion that this case involves a "taking" by the United States in violation of the Fifth Amendment to the U.S. Constitution is equally irrelevant to a case in which Mexico is the sole defendant.

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE FOREIGN SOVEREIGN IMMUNITIES ACT'S "IMMOVABLE PROPERTY" EXCEPTION DOES NOT APPLY TO PETITIONERS' CLAIMS.

This Court has never interpreted the "immovable property" exception to the FSIA. Nor had any federal court of appeals done so prior to the decision below.

The decisions of this Court teach that statutory interpretation must begin with the language employed by Congress and the assumption that the ordinary meaning accurately expresses the legislative purpose. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 65 (1982). In interpreting the words of a statute, a court has an "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979).

A. The Court of Appeals Construed and Applied the "Immovable Property" Exception Consistently With Its Plain Language, Legislative History and Purpose.

1. Plain Language, Legislative History and Purpose

Petitioners argue that there is federal court jurisdiction in this case because of the exception to the general rule of sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Their argument, however, depends upon a reading of the exception that was correctly found by the Court of Appeals to be impermissibly expansive and unsupported by the FSIA's legislative history and purpose.

The Court of Appeals, in construing the exception as inapplicable to Petitioners' claims, looked first to the language, and found its meaning to be far from plain:

> [T]he term "rights in immovable property" is an imprecise one, susceptible of as many different meanings as there are areas of law for which that characterization of an interest may be relevant.

Pet. App. at 7a.[1]

The Court of Appeals then proceeded, as this Court has advised, to interpret the statutory language in light of its "reading of the legislative history and [its] understanding of the purpose" of the FSIA. *Id.* The purpose of the Act, it found, was

> to codify the so-called "restrictive" principle of sovereign immunity, under which foreign sovereigns are accorded immunity with regard to their sovereign or public acts (*actiones jure imperii*), but not with

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[1] Those who have treated the exception's meaning as self-evident have interpreted it, as did the Court of Appeals below at the end of the day, as limited to actions affecting ownership interests in, or rights to possession of, real property. *See, e.g.*, 7B J. Moore, M. Waxner, H. Fink, D. Epstein & G. Grotheer, Jr., *Moore's Federal Practice* § 1605 at JC-800.9 (2d ed. 1984); Boyd, *Litigation Against Foreign Governments*, Litig., Fall 1981, at 14, 16.

> respect to their commercial acts (*actiones jure gestionis*), and in addition to withhold immunity for certain narrowly defined public acts for which local adjudication was deemed imperative (*e.g.*, traffic accidents caused by employees and officials of a foreign embassy).

Pet. App. at 4a, *citing* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, 20-21, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6619-20 (hereinafter cited as "House Report"). In particular, the purpose of the "immovable property" exception, one of those exceptions for "narrowly defined public acts for which local adjudication was deemed imperative," was explicitly declared by Congress to be

> to codify, with minor exceptions not relevant here, the pre-existing real property exception to sovereign immunity, recognized by international practice.

Pet. App. at 7a, *citing* House Report at 20, *referring to* Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't of State, 26 Dep't of State Bulletin 984 (1952), *reprinted in Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 54-55 (1976).

2. The Meaning of the "Immovable Property" Exception

Having concluded that the purpose of the FSIA's "immovable property" exception was to codify preexisting "international practice," the Court of Appeals turned to that practice and found that it

> declined to extend the immunity of a foreign sovereign to "an action to *obtain possession of or establish a property interest in* immovable property located in the territory of the state exercising jurisdiction."

Id. at 7a, *quoting* Restatement (Second) of Foreign Relations Law of the United States § 68(d)(1965) and Restatement (Second) of Foreign Relations Law of the United States (Revised) § 455(1)(c) and comment b (Tent. Draft No. 2, 1981) (emphasis added). The Court of Appeals therefore concluded that the "immovable property" exception codifying that practice "is limited to disputes directly implicating [real] property interests or rights to possession," Pet. App. at 9a—in other words, to disputes whose resolution would "affect property interests in, or rights to possession of, land located in the United States." *Id.* at 13a.[2]

Because Congress intended the FSIA to codify the pre-existing U.S. foreign relations law with respect to the "immovable property" exception, the Court of Appeals' determination of the scope of that exception by reference to U.S. foreign relations law was logical and necessary. *See* Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect,* 3 Yale Studies in World Public Order 14, 15 (1976) (courts are expected to interpret FSIA in light of pre-FSIA practice). Other courts have done likewise when faced with the necessity of construing the FSIA. *See McKeel v. Islamic Republic of Iran,* 722 F.2d 582, 587 (9th Cir. 1983), *cert. denied,* 105 S. Ct. 243 (1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982); *see also* Crawford, *Execution of Judgments and Foreign Sovereign Immunity,* 75 Am. J. Int'l L. 820, 852 (1981). Any other source of meaning is less faithful to the congressional purpose and thus inherently less reliable.

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[2] The lower courts that have discussed the "immovable property" exception have viewed it as encompassing only actions establishing ownership or possessory rights in real estate. *See In re Rio Grande Transport, Inc.,* 516 F. Supp. 1155, 1160 (S.D.N.Y. 1981) ("The legislative history of § 1605(a)(4) unequivocally indicates that immovable property refers only to real estate."); *2 Tudor City Place Associates v. Libyan Arab Republic Mission to the U.N.,* 121 Misc. 2d 945, 470 N.Y.S.2d 301 (N.Y. Civ. Ct. 1983) (motion to vacate default judgment of possession); *County Board v. German Democratic Republic,* No. 78-293-A (E.D. Va. Sept. 6, 1978), *reprinted in* 17 *Int'l Legal Materials* 1404-06 (1978) (amendment of complaint to seek tax lien allowing the plaintiff to sell real estate stated case within exception).

Petitioners' contention that the scope of the "immovable property" exception is far more expansive, embracing not only "disputes directly implicating property interests or rights to possession" but also their claims, which they describe as "emanating from" and "deriving from" real property, is not supported by legislative history. The only item of legislative history cited by Petitioners in support of their interpretation is Congress' inclusion of "rent . . . and similar matters" in its enumeration of matters that local states have traditionally had the right to adjudicate. As the Court of Appeals noted, however, the mention of rent in no way implies that Congress intended to expand the traditional real estate exception to include claims like Petitioners'. Pet. App. at 9a n.5, discussing House Report at 20. Actions for rent frequently, if not always, "call into question either ownership or possessory rights." *Id.*

Petitioners' contention that the Court of Appeals should have ignored U.S. foreign relations law in favor of state law as a guide to the "immovable property" exception's meaning is equally unpersuasive. It is absurd to suggest that, in order to eliminate inconsistencies in immunity determinations by the Department of State, Congress enacted a federal law whose meaning was to be furnished by the various laws of the fifty states. *See* House Report at 7. Moreover, as the Court of Appeals noted, the term "rights in immovable property" is defined differently in different jurisdictions for different purposes. Pet. App. at 7a. Petitioners' ransacking of those laws inevitably results in what the Court of Appeals aptly termed "an artificial consensus definition," rather than a reliable indicator of congressional intent. *Id.*[3]

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[3] Even if state law were somehow relevant to the interpretation of the FSIA's "immovable property" exception, it would not expand that exception so as to encompass Petitioners' claims. That compensation awarded for the compulsory conversion of real estate may be treated, for some purposes and for some period of time, as real estate, *see* Petition at 24, is irrelevant. A compensation fund does not constitute "immovable property" for the purposes of the FSIA. *In re Rio Grande Transport, Inc.*, 516 F. Supp. 1155, 1160

(footnote continues)

Petitioners' contention that resolution of their claims, even if it will have no effect on the actual ownership of U.S. land, will require determination of "the title of Petitioners' ancestors as well as Petitioners' inheritance rights" and thus "rights in immovable property" will be "in issue" for purposes of the FSIA, Pet. at 28, is also unpersuasive. The Court of Appeals correctly determined that "rights in immovable property" for the purposes of the FSIA are rights the exercise of which would "affect property interests in, or rights to possession of, land." Pet. App. at 13a. It also determined that "[n]either the title to, nor the use of the Texas lands can conceivably be affected by the outcome of this suit." *Id.* at 11a. Since determination of ancestral title rights and inheritance rights would not affect property interests or give rise to rights of possession, those rights are not "rights in immovable property" within the meaning of the FSIA, even if consideration of such issues would be necessary to a resolution of Petitioners' claims.[4]

(footnote continued)

(S.D.N.Y. 1981) (disaster liability compensation fund not FSIA "immovable property"). Furthermore, claims like Petitioners' are not "rights in immovable property" under civil law. Actions, like Petitioners', that cannot directly affect real property, do not "assert an interest in immovable property." *See Hawthorne Oil and Gas Corp. v. Continental Oil Co.*, 377 So.2d 285 (Sup. Ct. La. 1979) (applying La. venue statute). Mexican law excludes funds owed as the result of a disposition of a claim in real property from the definition of the term "immovable." *See* Directo 558-61/2, *Fortino Lopez Cuevas y Coags.*, 3rd Chamber, Supreme Court of Justice, 1965 Rep. at 15.

[4] The Court of Appeals' reading of the "immovable property" exception is also supported by reference to the execution immunity section, 28 U.S.C. § 1610(a)(4)(B). The "immovable property" exception to jurisdictional immunity, like all other FSIA provisions, exists not in isolation but as a part of a comprehensive statute that must be read as a whole. Therefore, it must be interpreted consistently with the FSIA's exception to general immunity from attachment and execution upon a foreign state's property in the United States where "the execution relates to a judgment *establishing rights* in property . . . which is immovable and situated in the United States" 28 U.S.C. § 1610(a)(4)(B) (emphasis added). Although the language is somewhat different, there is no reason to suppose that Congress was attempting to create shades of difference between the two sections of the statute, or that the two sections should be read differently.

(footnote continues)

3. Application of the "Immovable Property" Exception

Having established that "rights in immovable property" are, for the purposes of the FSIA's narrow exception to foreign sovereign immunity, limited to property interests or rights to possession, the Court of Appeals properly turned to the precise nature of Petitioners' claims. Pet. App. at 10a-13a. The Court found that those claims are not

> property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land. Neither the title to, nor the use of the Texas lands can conceivably be affected by the outcome of this suit.

Id. at lla. For that reason, the Court of Appeals held that Petitioners' claims are outside the scope of the "immovable property" exception. *Id.*

Petitioners advance no argument, nor any evidence from which it can be inferred, that title to, or the possession or use of, U.S. land will be affected by any outcome of this suit. In the absence of any basis for characterizing Petitioners' claims as ones affecting title, possession or use, the Court of Appeals correctly concluded that those claims were outside the FSIA.

The FSIA provides the sole basis for subject matter jurisdiction over suits against foreign states. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983).[5] Since neither the "immovable property" nor any other statutory exception to

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(footnote continued)

By construing the "in issue" language of the FSIA's "immovable property" exception to jurisdictional immunity congruently with the "establishing rights in" language of the FSIA's "immovable property" exception to execution immunity, the Court of Appeals acted in accord with Congress' intent.

[5] *See* also *Ruggiero v. Compania Peruana de Vapores,* 639 F.2d 872, 875-76 (2d Cir. 1981) (Friendly, J.); *see also Rex v. Cia. Pervana de Vapores, S.A.,* 660 F.2d 61 (3d Cir. 1981), *cert. denied,* 456 U.S. 926 (1982); *Williams v. Shipping Corp. of India,* 653 F.2d 875, 877-81 (4th Cir. 1981), *cert. denied,* 455 U.S. 982 (1982).

sovereign immunity applies here, the Court of Appeals properly found that Petitioners are barred from raising their claims against Mexico in any United States court.

B. The Court of Appeals Correctly Concluded That the *Comegys* and *Bachman* Cases Do Not Bring Petitioners' Claims Within the "Immovable Property" Exception.

Contrary to Petitioners' assertion, the decision of the Court of Appeals that Petitioners' claims do not involve rights in immovable property within the meaning of the FSIA does not conflict with any "longstanding rule" established by *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), or *Bachman v. Lawson*, 109 U.S. 659 (1884). *Comegys* and *Bachman* did not hold that claims like Petitioners' involve rights in immovable property. Nor did they imply or suggest such a thing. In fact, neither *Comegys* nor *Bachman* involved immovable property at all. Both involved claims arising from the capture of ships and their cargoes belonging to U.S. citizens.

Comegys involved a claim that had already been adjudicated by an international claims commission and found to be meritorious. The only issue was the ownership of that claim between two private parties (specifically, an assignee in bankruptcy and the bankrupt). In determining which of the parties owned the claim, this Court considered whether "an indemnification for unjust captures is to be deemed . . . as in the nature of a donation, as contrasted with right," 26 U.S. (1 Pet.) at 217, and found that, under the Treaty of 1819 with Spain, it was a right. Because the question was not before it, however, this Court did not classify that right.[6] *Comegys* thus has no bearing on whether Petitioners' alleged claims are rights in immovable property within the meaning of the FSIA.

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[6] To the extent the Court's language in *Comegys* expressed a view as to the nature of the right in issue there, it contradicted Petitioners' contention. The Court speaks in terms of "indemnification" and "an existing right to compensation," 26 U.S. (1 Pet.) at 217, not of a right for recovery that would constitute a right "in" property, whether movable or immovable.

Bachman is of even less relevance. In that case, plaintiffs sued to collect a fee pursuant to a written agreement that promised them "a compensation equal to twenty-five per cent. of whatever sum shall be collected" on a claim for compensation for a captured ship, in return for their best efforts to collect on the claim. 109 U.S. at 660. Subsequent to the agreement, the defendants independently pursued their rights with respect to the claim before a tribunal established by the Treaty of Washington. Rejecting defendants' argument that their claim (and thus their obligation to pay plaintiffs) had been extinguished by that Treaty, this Court held that defendants' claim before the tribunal was the same claim contemplated by their agreement with plaintiffs. 109 U.S. at 662. However, it never held that the right in issue had the same character it had before submission of the claim to the tribunal, and never characterized the right as one in property. Thus this Court has in no way implied that Petitioners' claims maintain any character they may once have had as "rights in immovable property" despite the operation of the 1941 Treaty.

Petitioners' ultimate conclusion, on the basis of their reading of *Comegys* and *Bachman,* is that, "[a]s an essential incident of ownership, Petitioners' families were entitled to be compensated for any wrongful taking of their land, a right neither created nor extinguished by the 1941 Treaty." Pet. App. at 16. This proposition is completely irrelevant to the issue of whether this case is one in which rights in immovable property within the United States are in issue. Even if such an "entitle[ment] to compensa[tion]" exists, that fact does not bring it within the FSIA's "immovable property" exception. To the contrary, the legislative history and purpose conclusively demonstrate that such an "entitlement" would be outside the FSIA.

Moreover, Petitioners' ultimate conclusion is incorrect. The 1941 Treaty expressly undertakes to cancel, renounce and satisfy claims deriving from any such taking. 1941 Treaty, art. III. This Court has long held that, by espousing a claim of its national for injuries inflicted by a foreign government, the

espousing government makes the claim its own. *United States ex rel. Boynton v. Blaine,* 139 U.S. 306, 323 (1890); *see also La Abra Silver Mining Co. v. United States,* 175 U.S. 423 (1899); *United States ex rel. Angarica v. Bayard,* 127 U.S. 251 (1888); *Great Western Insurance Co. v. United States,* 112 U.S. 193 (1884); and *Frelinghuysen v. United States ex rel. Key,* 110 U.S. 63 (1882). The espousing government may therefore do with an espoused claim as it wishes. *Williams v. Heard,* 140 U.S. 529 (1890); *Frelinghuysen v. United States ex rel. Key,* 110 U.S. at 63; *Phelps v. McDonald,* 99 U.S. 298 (1878); *Frevall v. Bache,* 39 U.S. 95 (1840); *The Caldera Cases,* 15 Ct. Cl. 546 (1879).

International law likewise provides that:

> The government is the sole judge of what claims it will enforce, and of the manner, time, means and extent of enforcement. It may refuse to present a claim at all. After espousal of a claim, the government may abandon it, submit it to arbitration or make any other disposition thereof which it deems expedient in the public interest, *e.g.,* the government may compromise it, or release it, without compensation or for a consideration of benefit to the general public.

E. Borchard, *The Diplomatic Protection of Citizens Abroad* 366 (1915). *See also* 6 J. Moore, *A Digest of International Law,* 1012-27 (1906); L. Henkin, *Foreign Affairs and the Constitution* 262-63 (1972); Restatement (Second) of Foreign Relations Laws of the United States at §§ 212, 213; R. Lillich, *International Claims: Their Adjudication By National Commissions* 103 (1962). For this reason, the Court of Appeals correctly concluded in this case that the claims of Petitioners' predecessors were, vis-à-vis the United States and Mexico, "extinguished by the 1941 Treaty." Pet. App. at 12a.

II. THE DECISION OF THE COURT OF APPEALS RAISES NO CONSTITUTIONAL ISSUE.

Contrary to Petitioners' contention, the Court of Appeals' reading of the 1941 Treaty does not require this Court to determine whether, in entering into that Treaty, the United States committed a "taking" for which compensation should be provided under the Fifth Amendment. Pet. at 18, 19. The Court of Appeals did not reach that issue. *See* Pet. App. at 15a (Edwards, J., concurring). To reach out to that issue in this action, to which the United States is not a party, would be both unnecessary and inappropriate. If Petitioners ever sought to sue the United States in the Court of Claims, it would be soon enough for that court to reach that issue. Whether Petitioners can bring such a suit has nothing to do with this case.

CONCLUDING STATEMENT

The Court of Appeals decisively held that the "immovable property" exception to the FSIA did not apply to Petitioners' claims. While the Petition has narrowed the focus of this case to that issue alone, the United Mexican States nevertheless wishes to bring to this Court's attention several matters of special importance.

Retroactivity

The FSIA, enacted in 1976, codifies the principle of restrictive sovereign immunity, under which a foreign state is immune from the jurisdiction of U.S. courts except in rare cases with respect to its commercial and private acts—a principle that had been adopted by the Department of State as a matter of practice in 1952. Prior to that time, foreign sovereign states were absolutely immune from suit in U.S. courts.

To the extent the FSIA has changed the rule of absolute immunity, it has done so only prospectively. Neither the language nor the legislative history reveals any "unequivocal and inflexible intent," *De Rodulfa v. United States,* 461 F.2d

1240, 1247 (D.C. Cir.), *cert. denied,* 409 U.S. 949 (1972), *quoting Greene v. United States,* 376 U.S. 149 (1964), that the legislation be retroactively applied. In the absence of that intent, to modify the immunity to which Mexico would have been entitled in 1941 and to apply the FSIA retroactively to claims that allegedly arose at least 35 years prior to its enactment would be an unfortunate and an unfair result.

Act of State Doctrine

The modern touchstone of the Act of State Doctrine is judicial deference to the primacy of the executive branch in the conduct of foreign policy. *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964). The essence of the doctrine is that courts, looking to the nature of a dispute and the international sensitivity of its issues, should avoid a result that unduly challenges the sovereign authority of a foreign state's government.

It is difficult to envision circumstances more sensitive or closely related to official policy of the United Mexican States than those presented in this case. Petitioners apparently seek to use the judicial power of the United States to inquire into numerous facets of Mexico's exercise of its executive and legislative prerogatives, and to force actions uniquely within the competence of the executive and legislative branches of the government of the United Mexican States. Any such invitation thus to regulate the internal affairs of a foreign sovereign state should be declined.

International Law

Any resolution of claims by Petitioners against the United Mexican States must be governed by the 1941 Treaty, part of the supreme law of the land under the U.S. Constitution. Any inconsistent resolution of those claims implicates not only United States law but international law as well. Petitioners' attempts, through the use of the U.S. courts, to rewrite the

terms of the 1941 Treaty, or to frustrate its object or purpose, or to reformulate the bilateral relationships between the United States and Mexico, should be resisted.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN H. SHENEFIELD*
DOROTHY ASHLEY DOHERTY
D. STEPHEN MATHIAS
CAROL A. CORCORAN

MILBANK, TWEED, HADLEY & MCCLOY
1825 Eye Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 835-7500
Attorneys for Respondent

* *Counsel of Record*

February 20, 1985

APPENDIX A

28 U.S.C.

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. **Immunity of a foreign state from jurisdiction**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. **General exceptions to the jurisdictional immunity of a foreign state**

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the

territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided,* That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit—unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be deemed to constitute valid delivery of such notice; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in subsection (b)(1) of this section or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided,* That a court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose, such value to be determined as of the time notice is served under subsection (b)(1) of this section.

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§ 1609. **Immunity from attachment and execution of property of a foreign state**

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. **Exceptions to the immunity from attachment or execution**

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.